TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 121.

ANDREW DOHERTY, PLAINTIFF IN ERROR,

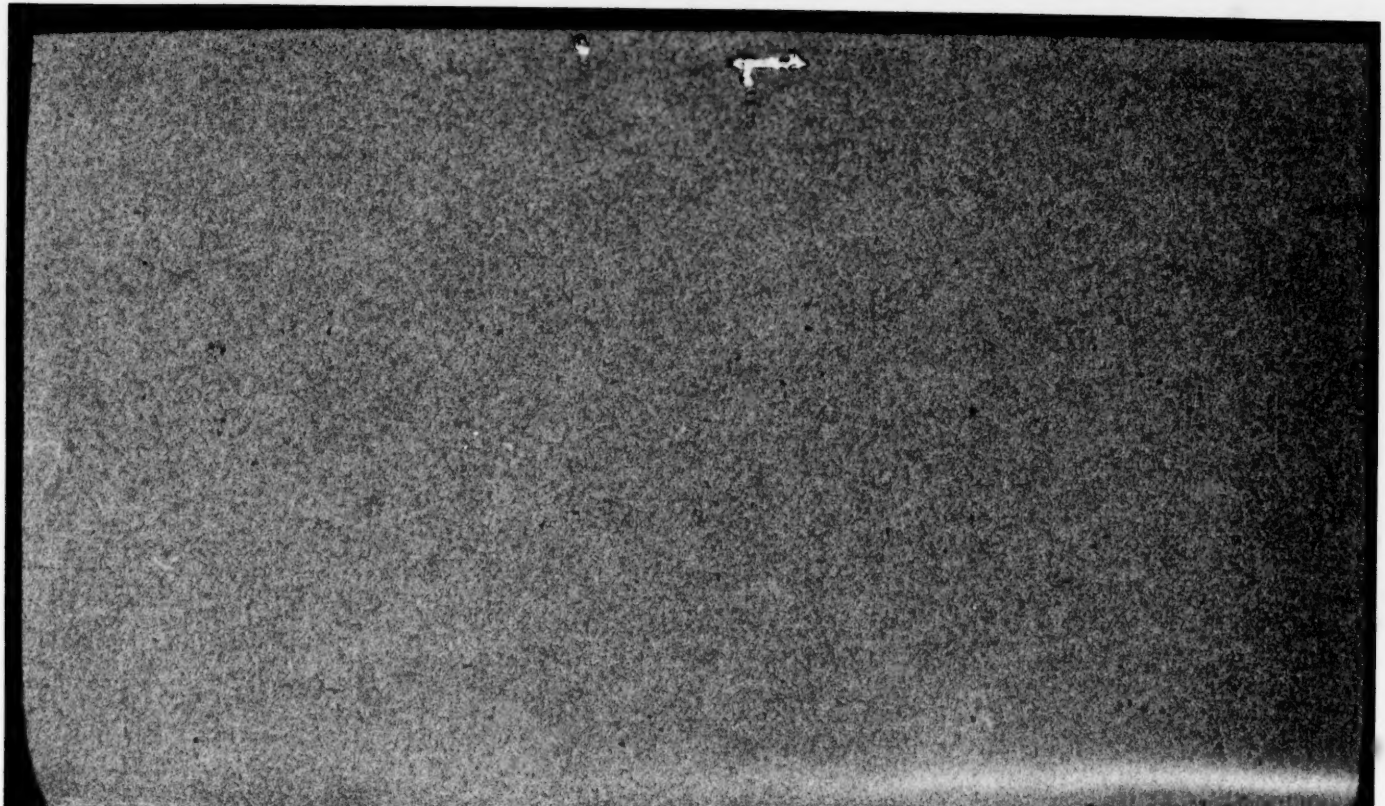
vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED AUGUST 28, 1899.

(16,965.)



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INDEX.

	Original.	Print.
Writ of error	1	1
Petition for writ of error	2	2
Assignment of errors	3	2
Citation	5	3
Service of citation	5½	3
Bond on writ of error	6	3
Caption	7	4
Transcript from superior court of Douglas county	8	5
Notice of appeal	8	5
Exhibit—Order of June 30, 1897, appealed from	9	5
Bond on appeal	12	7
Petition	14	8
Map showing property	17	10
Order for hearing petition	18	10
Answer to petition	20	11
Notice of bill of exceptions	39	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 8, 1899.

	Original.	Print.
Bill of exceptions	40	23
Stipulation of facts	41	24
United States patent to Doherty	42	24
Act of Congress, July 2, 1864	44	26
Joint resolution, May 31, 1870	59	35
Act of Minnesota, March 2, 1865	61	36
Act of Wisconsin, April 10, 1865	63	38
Letter, Secretary of the Interior to Commissioner of the General Land Office, August 13, 1870	66	39
Letter, Commissioner of the General Land Office to register and receiver, Bayfield, Wis., Sept. 15, 1870	67	40
Resolution of directors, May 9, 1882	68	41
Certificate of President Villard to map	69	41
Affidavit of A. Anderson	70	42
Letter, Villard to Secretary Teller, July 3, 1882	70	42
Letter, Secretary Teller to Commissioner of the General Land Office, November 22, 1882	72	43
Letter, Commissioner of the General Land Office to register and receiver, Bayfield, Wis., Jan. 5, 1883	73	44
Letter, Commissioner of the General Land Office to register and receiver, Bayfield, Wis., June 22, 1883	75	45
Letter, Commissioner of the General Land Office to register and receiver, Bayfield, Wis., Oct. 20, 1883	78	47
Resolution of directors, August 20, 1884	79	47
Letter, Commissioner of the General Land Office to register and receiver, Ashland, Wis., Feb. 3, 1887	80	48
Letter, Secretary Teller to the President, Sept. 14, 1882	85	50
Endorsement of the President, September 16, 1882	86	51
Letter, Secretary Teller to the President, Jan. 30, 1884	87	51
Endorsement of the President, January 31, 1884	88	52
Letter, Secretary Teller to the President, Feb. 6, 1885	89	52
Endorsement of the President, February 6, 1885	90	53
Letter, Josiah Perham to Secretary Usher, March 6, 1865	91	53
Letter, Secretary Usher to Commissioner of the General Land Office, March 9, 1865	91	54
Act of Congress, May 5, 1864	93	55
Deed, Lake Superior & Miss. R. R. Co. to N. P. R. R. Co., January 1, 1872	99	58
Agreement between Lake Superior & Miss. R. R. Co. and Northern Pacific R. R. Co., January 1, 1872	110	64
Agreement between Lake Superior & Miss. R. R. Co. and Northern Pacific R. R. Co., May 1, 1872	124	71
Agreement between Northern Pacific R. R. Co. and Lake Superior & Miss. R. R. Co., April 21, 1874	160	89
Agreement between Northern Pacific R. R. Co. and Lake Superior & Miss. R. R. Co., May 12, 1874	176	98
Agreement between Northern Pacific R. R. Co. and Lake Superior & Miss. R. R. Co., June 8, 1876	178	99
By-law fixing powers of president of Northern Pacific R. R. Co.	181	100
Objections to map of March 6, 1865	183	101
Petitioner's Exhibit A—Map	184	101

	Original	Print.
Railway Company's Exhibit 1—Map showing line of general route	185	101
2—Map showing line of definite location	186	101
3—Map from land office at Ashland	187	101
4—Map showing operative mileage of N. P. R. R. and branch lines	188	101
Judge's certificate to bill of exceptions	189	102
Judgment, June 30, 1897	190	102
Clerk's certifiacte	193	104
Order taking cause under advisement	194	104
Judgment	195	105
Opinion	197	105
Clerk's certificate	212	114

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Wisconsin, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in a suit between Andrew Doherty, plaintiff, and The Northern Pacific Railway Company, defendant, said suit being there entitled "In the matter of the petition of Andrew Doherty," wherein was drawn in question the validity of a statute or an authority exercised under the United States and the decision was against its validity, a manifest error hath happened, to the great damage of said Andrew Doherty, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 18th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

F. W. OAKLEY,
Clerk of Circuit Court of the United States,
Western District of Wisconsin,
By F. D. REED, *Deputy.*

The above writ is hereby allowed.
JOHN B. CASSODAY,
Chief Justice of Supreme Court of Wisconsin.

[Endorsed:] Filed Jul- 25, 1898. Clarence Kellogg, clerk of supreme court Wis.

STATE OF WISCONSIN, *Supreme Court,* } *ss:*

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

2 STATE OF WISCONSIN:

In the Supreme Court.

In the Matter of the Petition of ANDREW DOHERTY, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.

Now comes the above-named Andrew Doherty, plaintiff in error, and prays that a writ of error in the above-entitled case may issue to the said supreme court for the State of Wisconsin to review a certain judgment entered in said court on the 23rd day of June, 1898, in favor of the said Northern Pacific Railway Company, defendant in error, and against the said Andrew Doherty, plaintiff in error, and dismissing the petition of the said Andrew Doherty, plaintiff in error, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of Wisconsin, to the great damage of said plaintiff in error; all of which will more in detail appear from the assignment of error which is filed with this petition.

ANDREW DOHERTY,
Plaintiff in Error,
By M. S. BRIGHT, *His Attorney.*

April 2, 1890.
Dated July 14th, 1898.

3 STATE OF WISCONSIN:

In the Supreme Court.

In the Matter of the Petition of ANDREW DOHERTY.

ANDREW DOHERTY, Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.

Assignments of Error.

Now comes the above-named plaintiff in error, Andrew Doherty, by M. S. Bright, his attorney, and assigns the following errors in the judgment of this court herein:

I.

This court erred in its judgment that the petition of plaintiff in error be dismissed.

II.

This court erred in its judgment, wherein and whereby it decided that the plaintiff in error was not the owner of the land in controversy, and was not entitled to receive compensation for the taking thereof by the defendant in error.

III.

This court erred in its judgment, wherein and whereby it decided that the patent of the United States issued to the plaintiff in error upon his homestead entry under section 2289 of the Revised Statutes of the United States did not convey to the plaintiff in error the land in controversy.

4 IV.

This court erred in its judgment, wherein and whereby it held that the defendant in error had a right to use and occupy the land in controversy under the act of Congress of July 2nd, 1864, paramount to the right of the plaintiff in error under his said patent.

ANDREW DOHERTY,
By M. S. BRIGHT,
His Attorney.

Ap'l 2, 1890.
Dated July 14th, 1898.

5 UNITED STATES OF AMERICA:

To the Northern Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Wisconsin, wherein Andrew Doherty is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable John B. Cassoday, chief justice of the supreme court of the State of Wisconsin, this 18th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of Wisconsin.

5½ [Endorsed:] In the matter of the petition of Andrew Doherty. Andrew Doherty *vs.* The Northern Pacific Railway Company. Citation. Personal service of the within citation is hereby admitted this 22nd day of July, 1898. James B. Kerr & Louis Hanitch, attorneys for the Northern Pacific Railway Company.

6 Know all men by these presents that we, Louis Pratt and Chas. N. O'Hare, are firmly bound unto the Northern Pacific Railway Company in the full and just sum of two hundred and fifty dollars ($250), to be paid to the said Northern Pacific Railway Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18 day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, in the supreme court of the State of Wisconsin, in a suit pending in said court between Andrew Doherty, plaintiff, and The Northern Pacific Railway Company, defendant, said suit being there entitled "In the matter of the petition of Andrew Doherty," judgment was rendered against the said plaintiff, Andrew Doherty, and the said plaintiff having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid suit, and the citation directed to the said Northern Pacific Railway Company, citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, on or before the 17 day of August, 1898:

Now, the condition of the above obligation is such that if the said Andrew Doherty shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

LOUIS PRATT. [SEAL.]
CHAS. N. O'HARE. [SEAL.]

Sealed and delivered in presence of—

W. R. FOLEY.
C. H. CROWNHORT.

Approved by—

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

7 Pleas before the supreme court of the State of Wisconsin at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, the eleventh day of January, A. D. 1898.

Present: John B. Cassoday, chief justice; John B. Winslow, Silas U. Pinney, Roujet D. Marshall, and Charles V. Bardeen, justices.

CLARENCE KELLOGG, *Clerk.*

Be it remembered that heretofore, to wit, on the sixth day of July, in the year of our Lord one thousand eight hundred and ninety-seven, came into the office of the clerk of the supreme court of the State of Wisconsin the Northern Pacific Railway Company and filed in said court its certain notice of appeal and undertaking, according to the statute in such case made and provided, and also the return to such appeal of the clerk of the superior court of Douglas county, in said State, in the words and figures following—that is to say:

8 STATE OF WISCONSIN, }
Douglas County. }

Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Douglas County, Wisconsin.

Please take notice that The Northern Pacific Railway Company, respondent in the above-entitled proceeding, hereby appeals to the supreme court of the State of Wisconsin from the whole of the order made in this proceeding by the superior court for Douglas county aforesaid; which order was entered of record in said superior court on the 30th day of June, 1897. A copy of said order appealed from is hereto annexed.

Dated July 2nd, A. D. 1897.

JAMES B. KERR AND
LOUIS HANITCH,
Attorneys for the Northern Pacific Railway Company.

To Crownhart, Owen & Foley, attorneys for petitioner, Andrew Doherty.

9 STATE OF WISCONSIN, }
Douglas County. }

Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Douglas County, Wisconsin.

The above-entitled proceeding having come before this court upon the hearing of the petition of Andrew Doherty filed herein, the said hearing having been duly adjourned to this time, and the said petition having been presented to this court, together with proof of the service and publication of the notice required to be given herein, Messrs. Crownhart, Owen & Foley appearing as attorneys for Andrew Doherty, petitioner herein, and James B. Kerr, Esq., and Louis Hanitch appearing as attorneys for the Northern Pacific Railway Company, respondent herein, and the said Northern Pacific Railway Company having served and filed herein its answer showing cause against the granting of the prayer of said petition, and the said parties having presented and filed a stipulation in writing setting forth all of the facts touching the issues made herein, and the said parties having in open court agreed and consented to submit the issues made herein by the said petition and answer to this court for determination upon the said stipulation and upon all the files herein, and the court having examined said stipulation and all of the files herein and being fully advised in the premises—

Now, therefore, upon motion of Messrs. Crownhart, Owen & Foley—

It is hereby ordered and adjudged that the said Andrew Doherty, petitioner herein, is the owner in fee-simple of the land described in the said petition and more particularly delineated upon the map annexed to said petition.

It is hereby ordered and adjudged that the said Northern Pacific Railway Company is entitled to take and use for the purpose
10 of its right of way, upon making compensation therefor, the land described in said petition and upon which strip of land the said railway company is now maintaining and operating its said road and track.

And it is hereby further ordered and adjudged that it is necessary for the said railway company to take and have for its right of way the said land described in said petition ; and

It is hereby ordered and adjudged that no sufficient cause is shown by the said Northern Pacific Railway Company against granting the prayer of the petition of Andrew Doherty herein.

It is hereby ordered and adjudged that Fred. B. Southern, B. T. Randall, and S. W. Whitmore, being three disinterested and competent freeholders who reside in said county of Douglas, where the premises to be appraised are situated, be, and they are hereby, appointed commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate described in said petition and determined necessary to be taken in said county of Douglas and State of Wisconsin for the uses and purposes of the said Northern Pacific Railway Company, and to do and perform all of the several duties of commissioners, which said commissioners are authorized to perform by the statute in that behalf made and provided, and shall hold their said office and appointment for the term of one year from the date hereof ; and

It is hereby further ordered and adjudged that the first meeting of said commissioners shall be held on the 5th day of July, A. D. 1897, at nine o'clock in the forenoon of that day, at the office of the clerk of said superior court, in the Trade and Commerce building, in West Superior, in the city of Superior, in said county of Douglas; and

It is hereby further ordered and adjudged that the commissioners shall cause notice of the time, way, and place where they
11 will meet to consider the amount of the compensation to which said owners or persons interested in said real estate are entitled to be given to the said Northern Pacific Railway Company or other parties interested. Said notice shall be personally served on the said railway company or its authorized agents or attorneys at least six days before the time of such meeting.

And it is hereby further ordered and adjudged that said commissioners shall be entitled to a compensation at the rate of five dollars ($5.00) per day for the time actually and necessarily employed in

the discharge of their duties as such commissioners, and all necessary expenses incurred by them in the discharge of their duties.

Dated June 30, 1897.

By the court:

C. SMITH, *Judge.*

12 STATE OF WISCONSIN, } *Douglas County.* }

Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Douglas County, Wisconsin.

Whereas, on the 30th day of June, A. D. 1897, in the superior court for Douglas county, an order was entered in the above-entitled proceeding appointing commissioners therein, and the said respondent, Northern Pacific Railway Company, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the State of Wisconsin:

Now, therefore, we, D. W. Twohy and A. W. Highfield, both of the city of Superior, in Douglas county, Wisconsin, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal not exceeding two hundred and fifty dollars.

Dated at Superior this 2nd day of July, A. D. 1897.

D. W. TWOHY.
A. W. HIGHFIELD.

STATE OF WISCONSIN, } *County of Douglas,* } *ss:*

D. W. Twohy and A. W. Highfield, being each first duly sworn, each for himself says that he is one of the subscribers to the foregoing undertaking; that he is a resident of the State of Wisconsin and is worth the sum of two hundred and fifty dollars, over and above all his debts and liabilities, in property within the State of Wisconsin not by law exempt from execution.

D. W. TWOHY.
A. W. HIGHFIELD.

13 Subscribed and sworn to before me this 2nd day of July, A. D. 1897.

[NOTARIAL SEAL.] W. J. SMITHSON,
Notary Public, Douglas County, Wisconsin.

(Endorsed:) (Original.) State of Wisconsin, Douglas county. Superior court. In the matter of the petition of Andrew Doherty for the appointment of commissioners, etc. Notice of appeal and undertaking. Due and personal service of the within notice and undertaking is hereby admitted, at the city of Superior, in said State, on the 3rd day of July, 1897. Crownhart, Owen & Foley, at-

torneys for petitioner. Filed July 3, 1897. Wm. H. Locke, clerk superior court, Douglas Co., Wis. Ross, Dwyer & Hanitch, attorneys for N. P. R'y Co., First National Bank bldg., West Superior, Wis. Filed July 6, 1897. Clarence Kellogg, clerk of supreme court Wis.

14 STATE OF WISCONSIN, }
Douglas County. }

Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Douglas County, Wisconsin.

To the Hon. Chas. Smith, judge of the superior court of Douglas county, Wisconsin:

The petition of Andrew Doherty, the petitioner above named, respectfully represents—

That your petitioner is now and since Nov. 8th, 1882, has been the owner in fee-simple of the north one-half of the southwest quarter of section four (4), township forty-seven (47), range eleven (11) west, in Douglas county, Wisconsin.

That the Northern Pacific Railroad Company is a foreign corporation and is duly authorized by its charter and the laws of the United States to construct, maintain, and operate a line of railway from a point on Lake Superior in the States of Wisconsin or Minnesota to some point on Puget sound in the State of Washington; that some time during the year 1883 the said corporation, the Northern Pacific Railroad Company, unlawfully laid its railroad track upon a portion of petitioner's said land, to wit, the north one-half of the southwest quarter of section four, township forty-seven, range eleven west, and unlawfully entered upon, dug up, and removed soil therefrom and appropriated the same to its own use without the consent or authority of the petitioner, and has been in possession thereof ever since until about August 31st, 1896; that on or about August 31st, 1896, all the real and personal property, effects, rights, and franchises of the Northern Pacific Railroad Company *was*
15 transferred and sold to and purchased by the Northern Pacific Railway Company and *has* ever since been and now *is* controlled, operated, managed, and owned by the said Northern Pacific Railway Company.

That the said Northern Pacific Railway Company is a domestic corporation, and is duly authorized by its charter and the laws of the State of Wisconsin to maintain and operate the line of railway hereinbefore mentioned.

That the portion of the said north one-half of the southwest quarter of section four, township forty-seven, range eleven west, so entered upon and taken by said company is more particularly described as follows, to wit: A strip of land one hundred feet in width, extending in a straight line across the said north half of the south-

west quarter of sec. four, township forty-seven, range eleven west, the center line of said strip so taken being at the east boundary line of said land, 326 feet south from the northeast corner of said land, and being at the west boundary line, 610 feet south from the northwest corner of said land, all of which fully appears by the maps hereto annexed and made a part hereof.

That the said Northern Pacific Railway Company has been since August 31st, 1896, and now is maintaining and operating said road and track over the land of petitioner, as hereinbefore described.

That neither the said Northern Pacific Railroad Company now the said Northern Pacific Railway Company, its successor, has acquired title to the said tract of land above described or any part thereof nor any right thereto, and that neither has made any attempt to acquire title to the said tract of land by purchase, eminent domain, or otherwise, and that the said corporations and both of them have delayed and omitted to take or prosecute any proceeding or to take any steps to acquire title to the said premises or to have the damages of the petitioner occasioned by the said taking appraised.

16 Further petitioner alleges that the value of the land so taken and the damages occasioned petitioner by the taking thereof are less than five million dollars and more than $100.00.

Wherefore your petitioner prays that an order be made herein appointing three disinterested and competent freeholders, who reside in the county of Douglas, where the said premises are situated, commissioners to ascertain and appraise the compensation to be made to this petitioner by reason of the taking of the said premises, and that the time and place of the first meeting of said commissioners be fixed by said order.

ANDREW DOHERTY, *Petitioner.*

CROWNHART, OWEN & FOLEY,
Attorneys for Petitioner.

STATE OF WISCONSIN, }
County of Douglas, } ss:

Andrew Doherty, being first duly sworn, on oath deposes and says that he is the petitioner above named; that he has read the above and foregoing petition and knows the contents thereof and that the same is true to his own knowledge.

ANDREW DOHERTY.

Subscribed and sworn to before me this 19th day of Nov., 1896.

S. P. MARLETTE,
[NOTARIAL SEAL.] *Notary Public, Douglas County, Wis.*

(Endorsed:) State of Wisconsin, Douglas county. Superior court. 2490. Andrew Doherty, petitioner, *vs.* The Northern Pacific Railway Company, defendant. Petition. Personal service of the within petition is hereby admitted at the city of Superior, Wisconsin, on this 8th day of January, 1897. James B. Kerr and Louis Hanitch, attorneys for N. P. R'y Co. Crownhart, Owen & Foley, attorneys

for petitioner, rooms 9 to 14, First National Bank bldg., West Superior, Wis. Filed Dec. 12, 1896. G. W. Thompson, clerk superior court, Douglas Co., Wis. Filed July 6, 1897. Clarence Kellogg, clerk of supreme court Wis.

(Here follows map marked p. 17.)

18 STATE OF WISCONSIN, }
Douglas County. }

Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Wisconsin.

On reading the petition of Andrew Doherty, of Douglas county, Wisconsin, praying the appointment of three disinterested and competent freeholders who reside in said Douglas county as commissioners to ascertain and appraise the compensation to be made to the petitioner as damages occasioned by the taking of certain lands, the property of petitioner, by the said Northern Pacific Railway Company for a portion of its line in Douglas county, Wisconsin, which said petition is duly verified and was filed in the office of the clerk of this court on the 12th day of December, 1896: Now, therefore, on motion of Crownhart, Owen & Foley, attorneys for petitioner, it is ordered:

1st. That said petition be heard before me, at the superior court rooms, in the city of Superior, Douglas county, Wisconsin, on the 16th day of January, A. D. 1897, at nine o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard; 2nd, that the petitioner cause notice of the said time and place of hearing to be given to the said Northern Pacific Railway Company in the manner prescribed for the service of summons on railway corporations in this State by the statutes of the State of Wisconsin at least 5 days prior to the day herein fixed for said hearing.

C. SMITH,
Superior Judge.

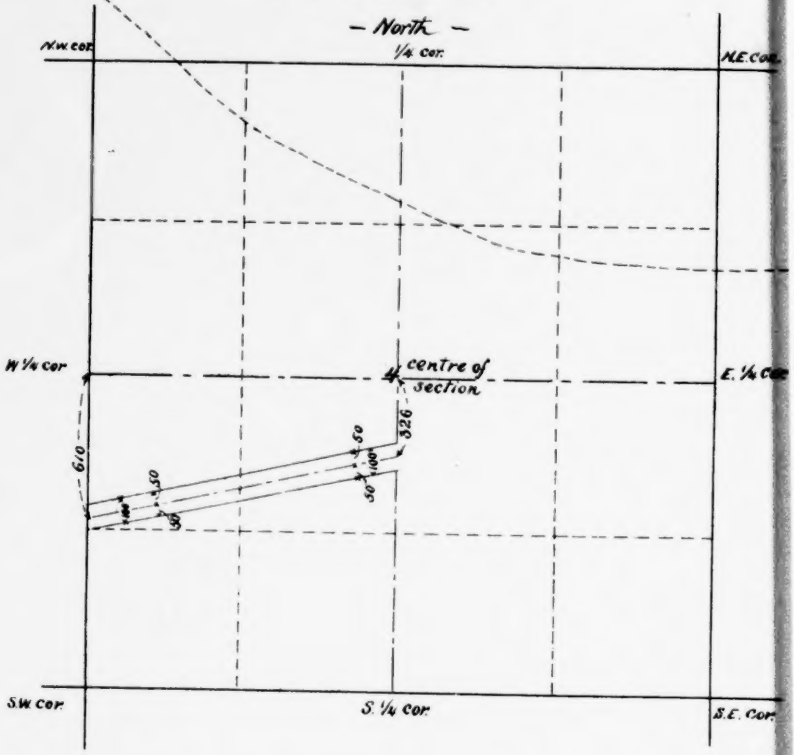
Dated January 8, 1897.

19 (Endorsed:) State of Wisconsin, Douglas county. Superior court. Andrew Doherty, plaintiff, *vs.* The Northern Pacific Railway Company, defendant. Order fixing time for hearing petition. Personal service of the within order is hereby admitted at the city of Superior, Wisconsin, on this 8th day of January, 1897. James B. Kerr and Louis Hanitch, attorneys for N. P. R'y Co. Crownhart, Owen & Foley, attorneys for petitioner, rooms 9 to 14, First National Bank bldg., West Superior, Wis. Filed Jan. 8, 1897. Wm. H. Locke, clerk superior court, Douglas Co., Wis. Filed July 6, 1897. Clarence Kellogg, clerk of supreme court Wis.

SECTION

TOWNSHIP 47 — RANGE 11 WEST

Douglas County Wisconsin



No. 121.
Doherty
vs
N.P.R.R.Co.
} p17.

20 STATE OF WISCONSIN, }
County of Douglas. }

Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Douglas County, Wisconsin.

The Northern Pacific Railway Company, respondent herein, by James B. Kerr and Louis Hanitch, its attorneys, for answer to the petition of Andrew Doherty, shows unto the court and alleges:

I.

Respondent admits that the Northern Pacific Railroad Company is a corporation duly authorized by its charter and the laws of the United States to construct, maintain, and operate a line of railroad from a point on Lake Superior in the State of Wisconsin to some point on Puget sound, and to construct, maintain, and operate other lines of railroad; that several years prior to the commencement of this proceeding the said Northern Pacific Railroad Company laid its railroad track upon certain land described in said petition, to wit, the north half of the southwest quarter (N. ½ S.W. ¼) of section four (4), in township forty-seven (47) north, of range eleven (11) west; but respondent denies that the said railroad company unlawfully laid said track upon said land or unlawfully entered upon, dug up, and removed soil therefrom. Respondent alleges that the said railroad company was fully empowered and authorized to lay said track, and to enter upon said premises, and to remove soil therefrom, and to appropriate the same to its own use, as is hereinafter more fully set forth.

Respondent admits that the said Northern Pacific Railroad Company remained in possession of said last-described land from
21 the time when said track was laid thereon, as aforesaid, until about August 31, 1896, and that on or about August 31, 1896, all the real and personal property, effects, rights, and franchises of the said Northern Pacific Railroad Company situated or to be exercised in the State of Wisconsin were transferred to respondent, The Northern Pacific Railway Company, and said respondent has ever since said 31st day of August, 1896, controlled, operated, managed, and owned the said railway so laid upon the land last above described.

Respondent admits that it is a domestic railway corporation, and alleges that it is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and duly authorized by its charter and the laws of said State to maintain and operate the lines of railway mentioned in the petition herein.

Respondent admits, as alleged in said petition, that the portion of said north half of the southwest quarter of section 4, in township 47 north, of range 11 west, so entered upon and taken by said

Northern Pacific Railroad Company, and so occupied and used by respondent, is more particularly described as follows, to wit:

A strip of land one hundred feet in width extending in a straight line across the north half of the southwest quarter of section 4, in township 47 north, of range 11 west, the center line of said strip being, at the east boundary of said land, three hundred and twenty-six (326) feet south from the northeast corner of said land, and being, at the west boundary of said land, six hundred and ten (610) feet south of the northwest corner of said land.

Respondent admits that it has been and is now maintaining and operating said road and track over said last-described land, and denies that the petitioner has any interest in said land so occupied by respondent.

22 Respondent admits that the value of the land so taken and occupied by said railroad company and respondent is less than five million (5,000,000) dollars.

II.

Respondent denies each and every allegation, matter, or thing alleged in said petition not herein specifically admitted, modified, or denied.

III.

Further answering, respondent alleges that the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof; that by the terms and provisions of said act said railroad company was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company within the territory of the United States on a line north of the 45th degree of latitude to some point on Puget's sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon.

IV.

That by section two of said act it was provided as follows:

"That the right of way through the public lands be and the same is hereby granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, ad-

23 jacent to the line of said road, material of earth, stone, timber and so forth, for the construction thereof. Said way is

granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill."

V.

That by section three of said act lands were granted to said railroad company as follows:

"That there be and hereby is granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated and free from preemption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and
24 whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * Provided, further, that all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, may be selected as above provided; and provided further, that the word 'mineral' when it occurs in this act, shall not be held to include iron or coal." * * *

VI.

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States should appoint three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said railroad and telegraph

line had been completed in a good, substantial, and workmanlike manner, and in all other respects as required by said act, such commissioners should so report to the President of the United States, and patents of lands as aforesaid should be issued to the said company, confirming all right and title to said lands situated opposite to and coterminous with such completed section of said road; and that whenever, from time to time, twenty-five additional consecutive miles should have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land as aforesaid, and so on,
25 as fast as every twenty-five miles of said road should be so completed.

VII.

That by section six of said act it was provided as follows:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale."

VII½.

That by section fifteen of said act it was provided as follows:

"That the president, vice-president and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years respectively, and until others are chosen in their place and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven including the president shall be a
26 quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors may have full

power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents and subordinates, as may, from time to time, be necessary to carry into effect the object of the company and to do all acts and things touching the location and construction of said road."

VIII.

That by section 12 of said act it was provided that the acceptance of the terms and conditions of said act by said Northern Pacific Railroad Company should be signified in writing, under the corporate seal of said company duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance should be made within two years after the passage of said act, and should be served on the President of the United States within two years after the passage of said act.

That said railroad company duly accepted the terms, conditions, and impositions of said act in writing, under its corporate seal executed pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

IX.

That by section eighteen of said act it was provided that said Northern Pacific Railroad Company should obtain the consent of the legislature of any State through which any portion of
27 said railroad line might pass previous to commencing the construction thereof. Pursuant to such provision of said section eighteen, said Northern Pacific Railroad Company obtained such consent of the legislature of Wisconsin, which consent was conferred by an act entitled "An act to authorize the Northern Pacific Railroad and Telegraph Company, incorporated by an act of Congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast by the northern route,' approved July 2d, 1864, to construct their railroad and telegraph line through the State of Wisconsin," said act being chapter 465 of the private and local laws of the State of Wisconsin for the year 1865, said act being approved April 10th, 1865.

X.

That thereafter and for the purpose of ascertaining the most practicable route for a railroad to be constructed under the provisions of the said act of Congress of July 2, 1864, from a point on Lake Superior in Minnesota or Wisconsin to Puget's sound, the Northern Pacific Railroad Company caused surveying and exploring parties to be put into the field during the years 1866, 1867, 1868, and 1869, and during those years said parties, acting for said railroad company, made surveys of various lines which appeared to be practicable for railroad routes, commencing at different points on Lake Superior and

extending westwardly therefrom; that said parties also explored and investigated the country north of the forty-fifth degree of latitude and west of various points on Lake Superior, and from time to time reported to the board of directors of said railroad company the results of such surveys and explorations; that neither the board of directors nor the officers of said railroad company were possessed of sufficient knowledge or information to determine upon or fix a feasible route for the railroad contemplated by said act of
28 Congress of July 2, 1864, prior to the making of the surveys and explorations, as above set forth.

XI.

That thereafter and on the 2nd day of February, A. D. 1870, the board of directors, by resolution duly adopted, directed the executive committee of the said railroad company to locate the line of the Northern Pacific Railroad Company, and thereafter the said executive committee located the general route of said railroad from the mouth of the Montreal river, a point on Lake Superior, in Wisconsin, westward over and across the States of Wisconsin and Minnesota to a point on the Red River of the North, on the western boundary of said State of Minnesota, near Fargo, in the then Territory of Dakota; and thereupon the said Northern Pacific Railroad Company, on the 13th day of August, A. D. 1870, duly caused to be transmitted to the Secretary of the Interior a certain map or plat showing the proposed general route of its said railroad, according to said location thereof, from the mouth of the Montreal river, a point on Lake Superior, in the State of Wisconsin, westwardly over and across said States of Wisconsin and Minnesota to said point on the Red River of the North near Fargo.

XII.

That the Secretary of the Interior, upon the receipt of said map or plat showing the proposed general route of the said railroad, as aforesaid, duly approved the same in all respects, and thereupon transmitted the said map or plat to the Commissioner of the General Land Office, with directions to the said Commissioner to file the said map or plat in his office and to withdraw from sale, entry, and pre-emption all the odd-numbered sections of public land, not mineral, within twenty miles of said line of general route as indicated on said map or plat.

XIII.

That the said Commissioner of the General Land Office, acting under the direction of the Secretary of the Interior, caused
29 said map or plat to be filed in his office on the 13th day of August, 1870, and thereafter and on the 15th day of September, 1870, directed the United States district land officers of the various land districts in Wisconsin and Minnesota, within which districts were situated any of said lands so directed to be withdrawn and withheld from sale, entry, or pre-emption, to withdraw and

withhold all odd-numbered sections of public land, not mineral, situated within twenty miles of said line of general route as shown on said map or plat.

XIV.

That by the same order wherein the Commissioner of the General Land Office directed the said lands to be withdrawn from sale, entry, and pre-emption the said Commissioner directed the said United States district land officers to increase the price of all even-numbered sections of public land, alternate to those odd-numbered sections so withdrawn as aforesaid, to two dollars and fifty cents per acre.

XV.

That, pursuant to the said orders of the said Commissioner of the General Land Office, the said odd-numbered sections of land were thereafter withdrawn as directed, and said even-numbered sections were increased in price to two dollars and fifty cents per acre, and by virtue of said order of the said Commissioner of the General Land Office the United States sold and disposed of large quantities of land included in said even-numbered sections in the State of Wisconsin and received payment therefor at the rate of two dollars and fifty cents per acre.

XVI.

That thereafter the said Northern Pacific Railroad Company definitely located that portion of its said railroad from the village of Thomson, now Thomson Junction, in Carlton county, State of Minnesota, eastward to a point in section fifteen (15), in township forty-seven (47) north of range two (2) west of the fourth principal meridian, Wisconsin, said point in said section fifteen being about eight miles east of the point indicated as the eastern terminus of said railroad upon the said map of general route so filed as aforesaid.

XVII.

That on or about the 5th day of July, 1882, the said Northern Pacific Railroad Company transmitted to the Secretary of the Interior a certain map or plat showing the line of said definite location from said Thomson eastward to said point in said section fifteen last mentioned, with the request that the same be transmitted to the Commissioner of the General Land Office for filing in his office and for such necessary and appropriate action thereon as should be in compliance with the law and the practice of the Department of the Interior.

XIX.

That thereupon the Secretary of the Interior transmitted said map of definite location of said portion of said railroad to the Commissioner of the General Land Office, who duly approved and accepted the same, and on the 6th day of July, 1882, filed the said last-mentioned map in his office.

XX.

That thereafter and on the 22nd day of November, A. D. 1882, the Secretary of the Interior directed the Commissioner of the General Land Office to cause to be withdrawn from sale, entry, and pre-emption all the odd-numbered sections of public lands coterminous with and situated within forty miles of said line of definite location as indicated upon said map so filed as aforesaid, in so far as the railroad of said Northern Pacific Railroad Company had been actually constructed upon said line of definite location; and thereupon and on the 5th day of January, A. D. 1883, complying with the directions of the Secretary of the Interior, the
31 Commissioner of the General Land Office made an order and transmitted the same to the land officers of the United States district land office at Bayfield, Wisconsin, wherein and whereby the said Commissioner directed the said district land officers to withhold from sale or entry and pre-emption all the odd-numbered sections of public land coterminous with and situated within forty miles of that portion of said line of definite location whereon the said Northern Pacific railroad had actually constructed its railroad.

XXI.

That thereafter and on the 17th day of May, A. D. 1883, the Secretary of the Interior further instructed the Commissioner of the General Land Office to withhold all odd-numbered sections of public land coterminous with and situated within thirty miles of said line of definite location of said railroad as shown upon said map so filed as aforesaid, without reference to the actual construction of said railroad; and thereupon and on the 22nd day of June, A. D. 1883, the Commissioner of the General Land Office, complying with the directions of the Secretary of the Interior, made and issued an order to the United States district land officers at Bayfield, Wisconsin, that being the district within which lands in Wisconsin were situated which were opposite to and coterminous with said line of definite location, directing said district land officers to withdraw and withhold from sale, entry, and pre-emption all the odd-numbered sections of public land situated within thirty miles of said line of definite location as shown upon said map of definite location so filed as aforesaid.

XXII.

That thereafter and on the 8th day of October, 1883, the Secretary of the Interior instructed the Commissioner of the General Land Office to withdraw and withhold from sale or entry or pre-emption all public lands coterminous with and situated within forty miles of said line of definite location as shown upon said map of
32 definite location so filed as aforesaid; and thereafter and on the 20th day of October, A. D. 1883, the Commissioner of the General Land Office made and issued an order to the United States district land officers of the United States district land office at Bayfield, Wisconsin, that being the district within which the

lands in the State of Wisconsin were situated, which were opposite to and within forty miles of said line of definite location so filed as aforesaid, wherein and whereby the said Commissioner directed the said district land officers to withdraw and withhold from sale all odd-numbered sections of public land situated opposite to and coterminous with and within forty miles of said line of definite location as shown upon said map of definite location so filed as aforesaid.

XXIII.

That thereafter and on the 28th day of August, A. D. 1884, the board of directors of the said Northern Pacific Railroad Company duly adopted the following resolutions:

"Resolved, That the eastern terminus or the point of beginning of the Northern Pacific railroad on Lake Superior be, and the same is hereby, fixed, determined, and established at a point at the city of Ashland, on Lake Superior, in the county of Ashland, in the State of Wisconsin, in section 27, township 48 north, range 4 west, of the fourth principal meridian."

And thereafter and on or about the 3rd day of December, A. D. 1884, the said Northern Pacific Railroad Company transmitted a copy of said resolution, duly certified by its secretary, under the corporate seal of said company, to the Commissioner of the General Land Office.

XXIV.

That said point at Ashland so fixed by said resolution of the board of directors of the Northern Pacific Railroad Com-
33 pany as the initial point of its said railroad is on the line of the definite location of said railroad, as shown by the map thereof filed in the office of the Commissioner of the General Land Office on the 6th day of July, 1882, as above set forth, and said point at Ashland is situated about twelve miles west of the most easterly point indicated on said map of definite location so filed on the 6th day of July, 1882.

XXV.

That thereafter the Commissioner of the General Land Office, in due exercise of the authority committed to him by law, considered the said resolution of the board of directors of the Northern Pacific Railroad Company and the question of the initial point of said railroad on Lake Superior, and ratified and confirmed the action of the said board of directors and accepted and approved the designation of said point at Ashland as the initial point of said railroad on Lake Superior; and said Commissioner caused to be prepared a diagram showing the final eastern terminus of said railroad at Ashland, and further made and issued an order and transmitted the same on the 3rd day of February, 1887, to the United States district land officers at the district land office located at Ashland, wherein and whereby the said Commissioner ordered all lands situated east of said initial point at Ashland to be released from said prior with-

drawals from sale, entry, and pre-emption for the benefit of the Northern Pacific Railroad Company.

XXVI.

That said Northern Pacific Railroad Company duly constructed the whole of its said line of railroad from a point on Lake Superior, in the State of Wisconsin, to wit, the city of Ashland, to Puget's sound, on the Pacific coast, in all respects as required by said act of Congress of July 2, 1864, and the acts and joint resolutions of Congress amendatory thereof, and the same was duly accepted
34 by the President of the United States, as provided in said act of Congress of July 2, 1864.

XXVII.

That the portion of said railroad extending west from said initial point at said city of Ashland to the said village of Thomson, in Carlton county, in the State of Minnesota, was duly constructed on said line of definite location so fixed as aforesaid, and said portion extending from Ashland to Thomson was duly examined in three sections by commissioners appointed by the President of the United States, as provided in said act of Congress of July 2, 1864.

XXVIII.

That the first of said three sections so examined by said commissioners extended from the said village of Thomson, in the State of Minnesota, to a point on Bluff creek, in the State of Wisconsin, a distance of twenty-five miles.

That the second of said three sections so examined by said commissioners extended from said point on Bluff creek, in said State of Wisconsin, to a point on the Brule river, in said State of Wisconsin, a distance of twenty-five miles.

That the third of said three sections so examined by said commissioners extended from said point on the Brule river to a point in the city of Ashland, in said State of Wisconsin, on Lake Superior.

That said commissioners so appointed by the President of the United States to examine said three sections of constructed road duly reported as to each of said sections that the same was constructed in a good, substantial, and workmanlike manner and in all other respects as required by said act of Congress of July 2, 1864.

That the Secretary of the Interior duly approved the said reports of said commissioners upon said three sections of con-
35 structed road and recommended to the President of the United States that the said three sections of railroad so constructed and examined by said commissioners, as aforesaid, be accepted and the said reports of the said commissioners be approved.

That the President of the United States thereupon duly approved the said report of the said commissioners and accepted the said three sections of constructed road, as provided in said act July 2, 1864.

XXIX.

That the said first of said three sections of constructed road extending from the village of Thomson to the city of Ashland, to wit, that section extending from said Thomson to said Bluff creek, was duly accepted by the President of the United States and the report thereon approved September 16, 1882.

That the second of said three sections, to wit, that section extending from said Bluff creek to said Brule river, was duly accepted by the President of the United States and the report thereon approved January 31st, 1884.

That the third of said three sections, to wit, that section extending from said Brule river to said city of Ashland, was duly accepted by the President of the United States and the report thereon approved February 6th, 1885.

XXX.

That said railroad so located and constructed as aforesaid was located and constructed over and across the said north half of the southwest quarter of section 4, in township 47 north, of range 11 west, fourth principal meridian, and that the said Northern Pacific Railroad Company lawfully entered upon and appropriated for its right of way for its said railroad the strip of land, one hundred feet in width, contained in said north half of southwest quarter of section 4, in township 47 north of range 11 west of the
36 fourth principal meridian, as particularly described in the petition herein.

That on July 2, 1864, the north one-half of the southwest one-quarter of section four, in township forty-seven north of range eleven west of the fourth principal meridian, being the premises mentioned in the petition herein, was public land of the United States, and by said act of Congress of July 2, 1864, the said Northern Pacific Railroad Company, by virtue of the matters and things herein set forth, was granted a right of way for its said railroad over and across the said north half of the southwest quarter of said section four, in township forty-seven north of range eleven west of the fourth principal meridian, said right of way so granted being two hundred feet in width on each side of the said railroad so located, constructed, and maintained over and across said last-described premises.

That the said right of way so granted to the said Northern Pacific Railroad Company over and across the said last-described premises includes and contains said strip of land one hundred feet in width, particularly described in the petition herein.

That respondent alleges that it has acquired by purchase all rights of the said Northern Pacific Railroad Company in and to its said railroad so located and constructed in the State of Wisconsin over and across the said north half of the southwest quarter of section four, in township forty-seven north of range eleven west of the fourth principal meridian, and is lawfully occupying the said premises for railroad purposes, and lawfully maintaining and op-

erating its said railroad over and across said premises, and any rights of the said petitioner in and to the said north half of the southwest quarter of section four, in township forty-seven north of range eleven west, are subject in all respects to the said right of way over and across the said north half of the southwest
37 quarter of said section four, township forty-seven north of range eleven west, so granted to the said Northern Pacific Railroad Company by said act of Congress approved July 2, 1864, and so transferred and conveyed to the respondent, The Northern Pacific Railway Company.

Wherefore respondent prays that the said petition may be dismissed, and that respondent may recover its just costs and disbursements herein.

LOUIS HANITCH AND
JAMES B. KERR,
Attorneys for Respondent, Northern Pacific Railway Company.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

W. H. Gemmell, being first duly sworn, on oath says that he is an officer, to wit, the assistant secretary, of the Northern Pacific Railway Company, named as the respondent in the foregoing answer, and that he makes this affidavit as such officer and on behalf of the said Northern Pacific Railway Company; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to those matters therein stated upon information and belief, and as to those matters he verily believes the same to be true.

W. H. GEMMELL.

Subscribed and sworn to before me this 9th day of June, A. D. 1897.

[NOTARIAL SEAL.] LEON T. CHAMBERLAIN,
Notary Public, Ramsey County, Minn.

(Endorsements:) State of Wisconsin, county of Douglas.
38 2490. *In re* petition of Andrew Doherty. Original. Filed June 30, 1897. W. H. Locke, clerk superior court, Douglas Co., Wis. Answer of respondent, Northern Pacific Railway Company. Due and personal service of within answer admitted this 30th day of June, 1897. Crownhart, Owen & Foley, att'ys for petitioner. Filed July 6, 1897. Clarence Kellogg, clerk of supreme court Wis.

39 STATE OF WISCONSIN, }
Douglas County. }

Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Douglas County, Wisconsin.

GENTLEMEN: Please take notice that the annexed is a copy of the bill of exceptions proposed on behalf of the respondent, Northern Pacific Railway Company, in the above entitled proceeding.
Dated July 2nd, 1897.

JAMES B. KERR AND
LOUIS HANITCH,
Attorneys for Respondent, Northern Pacific Railway Company.

To Messrs. Crownhart, Owen & Foley, attorneys for Andrew Doherty, petitioner.

40 STATE OF WISCONSIN, }
Douglas County. }

Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Douglas County, Wisconsin.

Bill of Exceptions.

Be it remembered that the above-entitled proceeding having come before this court, at the court-rooms, in the Trade and Commerce building, in West Superior, in the city of Superior, in said Douglas county, Hon. Charles Smith, judge, presiding, on the 30th day of June, 1897, upon the hearing of the petition of Andrew Doherty filed herein, the said hearing having been duly adjourned to that time and place, and the said petition having been presented to the said court, together with proof of the service and publication of the notice required to be given herein—Messrs. Crownhart, Owen and Foley appeared as attorneys for Andrew Doherty, petitioner, and James B. Kerr and Louis Hanitch appeared as attorneys for The Northern Pacific Railway Company, respondent—the said Northern Pacific Railway Company, having theretofore served and filed its answer showing cause against the granting of the prayer of said petition, did thereupon present said answer to the court. The said parties thereupon stated that they were ready to try the issues made by the said petition and answer, and did then and there present and file a stipulation, in writing, setting forth all the facts and evidence touching the issues made by said petition and answer and their objections to such evidence, and did then and there, in open court

agree and consent to submit the said issues to the said court for determination upon the said stipulation and upon all the files in said action, said stipulation being as follows, to wit:

41 STATE OF WISCONSIN, }
County of Douglas. }

Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Douglas County, Wisconsin.

Stipulation.

It is hereby stipulated and agreed by and between the parties to this proceeding, by their attorneys, that the following are and shall constitute the facts herein:

I.

That on the 8th day of November, A. D. 1882, the petitioner, Andrew Doherty, made application at the proper United States district land office to enter as a homestead under the laws of the United States the north half of the southwest quarter of section 4, township 47 north of range 11 west of the fourth principal meridian, in Douglas county, Wisconsin; that on said day the said application was allowed, and thereafter said petitioner, having complied in all respects with the requirements of the laws of the United States relating to homesteads, received a patent from the United States for said north half of the southwest quarter of section 4, in township 47 north of range 11 west on the 6th day of February, A. D. 1890. Said patent is in the words and figures following, to wit:

42 *Homestead Certificate No.* 171; *Application* 398.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Ashland, Wisconsin, whereby it appears that pursuant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Andrew Doherty has been established and duly consummated, in conformity to law, for the north half of the southwest quarter, the southwest quarter of the southwest quarter, and the southeast quarter of the northwest quarter of section four, in township forty-seven north of range eleven west of the fourth principal meridian in Wisconsin, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said Andrew Doherty the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Andrew Doherty and to his heirs and assigns forever.

In testimony whereof I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the sixth day of February, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

By the President:

BENJAMIN HARRISON,
By M. McKEAN, *Secretary.*

Recorded, vol. I, page 181.

[Seal United States General Land Office.]

J. M. TOWNSEND,
Recorder of the General Land Office.

43

II.

That on July 2nd, 1864, the north half of the southwest quarter of section four, township forty-seven north, range eleven west, Douglas county, Wisconsin, was public land of the United States.

That in the month of December, A. D. 1883, the Northern Pacific Railroad Company entered upon the said north half of the southwest quarter of section 4, township 47 north of range 11 west, and constructed thereon a railroad over and across the said land and upon a strip of land therein included, particularly described as follows, to wit, a strip of land one hundred feet in width extending in a straight line across the north half of the southwest quarter of section 4, in township 47 north, of range 11 west of the fourth principal meridian, the center line of said strip being at the east boundary of said land three hundred and twenty-six (326) feet south from the northeast corner of said land and being at the west boundary line six hundred and ten feet south from the northwest corner of said land.

That thereafter and until about August 31, 1896, the said Northern Pacific Railroad Company occupied the whole of said strip of land, one hundred feet in width, last above described as its right of way for railroad purposes.

III.

That about August 31, 1896, all the property, both real and personal, effects, rights, and franchises of the said Northern Pacific Railroad Company, except certain lands situated in the States of Minnesota and North Dakota, were sold and transferred to the respondent, the said Northern Pacific Railway Company.

IV.

That the said Northern Pacific Railway Company is a corporation organized and existing under the laws of the State of Wisconsin, and ever since August 31, 1896, has been maintaining and operating its railroad over said tract of land last described, one hundred feet in width, and situated upon the said north half of the
44 southwest quarter of section 4, in township 47 north of range 11 west of the fourth principal meridian, and has been and is now occupying said last-mentioned strip for railroad purposes.

V.

The said Northern Pacific Railway Company is duly authorized by its charter to maintain and operate the line of railroad herein mentioned.

VI.

That the value of the land so taken and occupied by the said Northern Pacific Railroad Company and the respondent, The Northern Pacific Railway Company, is more than one hundred dollars and less than five million dollars.

VII.

That by an act approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," Congress of the United States provided as follows, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Richard D. Rice, John A. Poore, Samuel P. Strickland, Samuel C. Fessenden, Charles P. Kimball, Augustine Haines, Edward R. W. Wiggin, Anson P. Morrill, Samuel J. Anderson, of Maine, Willard Sears, I. S. Withington, Josiah Perham, James M. Becket, A. W. Banfield, Abiel Abbott, John Newell, Austin L. Rogers, Nathaniel Greene, Jr., Oliver Frost, John A. Bass, John O. Bresbrey, George Shiverick, Edward Tyler, Filander J. Forristall, Ivory H. Pope, of Massachusetts, George Opdyke, Fairley Holmes, John Huggins, Philander Reed, George Briggs, Chauncy Vibbard, John C. Fremont, of New York; Ephraim Marsh, John P. Jackson, Jr., of New Jersey; S. M. Felton, John Toy, O. J. Dickey, B. F. Archer, G. W. Cass, J. Edgar Thompson, John A. Green, of Pennsylvania; T. M. Allyn, Moses W. Wilson, Horace Whittaker, Ira Bliss, of Connect-
45 icut; Joseph A. Gilmore, Onslow Stearns, E. P. Emerson, Frederick Smyth, William E. Chandler, of New Hampshire; Cyrus Aldrich, H. M. Rice, John McKusick, H. C. Waite, Stephen Miller, of Minnesota; E. A. Chapin, John Gregory Smith, George Merrill, of Vermont; James Y. Smith, William S. Slater, Isaac H. Southwick, Earl P. Mason, of Rhode Island; Seth Fuller, William Kellogg, U. S. Grant, William B. Ogden, William G. Greene, Leonard Sweat, Henry W. Blodgett, Porter Sheldon, of Illinois; J. M.

Winchell, Elsworth Cheesebrough, James S. Emery, of Kansas; Richard F. Perkins, Richard Chenery, Samuel Brannan, George Rowland, Henry Platt, of California; William F. Mercer, James W. Brownley, of Virginia; John H. B. Latrobe, W. Prescott Smith, of Maryland; Greenbury Slack, A. J. Boreman, of West Virginia; Thomas E. Bramlette, Frank Shorin, of Kentucky; John Brough, John A. Bingham, Oran Follett, John Gardner, S. S. L'Hommedieu, Harrison G. Blake, Philo Chamberlin, of Ohio; John A. Duncan, Samuel M. Harrington, of Delaware; Thomas A. Morris, Jesse L. Williams, of Indiana; Samuel L. Case, Henry L. Hall, David H. Jerome, Thomas D. Gilbert, C. A. Trowbridge, of Michigan; Edward H. Broadhead, Alexander Mitchell, Benjamin Ferguson, Levi Sterling, —— Marshall, of Wisconsin; J. C. Ainsworth, Orlando Humason, H. W. Corbett, Henry Failling, of Oregon; J. B. S. Todd, M. K. Armstrong, J. Shaw Gregory, J. Le Barge, of Dakota Territory; John Mullen, Anson G. Henry, S. D. Smith, Charles Terry, of Washington Territory; H. W. Starr, Platt Smith, Nixon Denton, William Leighton, B. F. Allen, Reuben Noble, John L. Davies, of Iowa; Willard P. Hall, George R. Smith, H. Gayle King, John C. Sargeant, of Missouri; William H. Wallace, of Idaho Territory; J. H. Lathrop, Henry D. Cooke, H. E. Merrick of the District of Columbia, and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style and title of the "Northern Pacific Railroad Company," and by that
46 name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's sound, with a branch, via the valley of the Columbia river, to a point at or near Portland in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the board of commissioners of the "Northern Pacific Railroad Company," and fifteen shall constitute a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Melodion hall, in the city of Boston, at such time as any five commissioners herein

named from Massachusetts shall appoint, not more than three months after the passage of this act, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Philadelphia, Cincinnati, Milwaukee and Chicago, once a
47 week at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. The secretary shall be sworn to the faithful performance of his duties and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said board shall in like manner call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities, or other places in the United States, as they, or a quorum of them, shall determine, within six months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per cent. on all subscriptions and to receipt therefor. So soon as twenty thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least fifteen days previous to *to* the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect by ballot thirteen directors for said corporation; and in such election each share of capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and, in case of their absence or inability, any two of the officers of said board shall act as inspectors of said election, and shall certify, under their hands, the names of the directors elected at such meeting; and the
48 said commissioners, treasurer and secretary shall then deliver over to said directors all the properties, subscription books and other books in their possession, and thereupon the duties of said commissioners, and the officers previously appointed by them, shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen) and for the transaction of business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right,

power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, materials of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy, and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquire- in the donation of the (road) named in this bill.

SEC. 3. And be it further enacted, That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction
49 of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the route- are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, that the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided further, that all mineral lands be, and the same are, hereby excluded from the operations of this act, and in lieu thereof a like quantity of
50 unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided: And provided further, that the word "mineral," when it occurs in this act, shall not be held to include

iron or coal: And provided further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific railroad."

SEC. 4. And be it further enacted, That whenever said "Northern Pacific Railroad Company" shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said railroad and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, that not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad from the place of beginning on Lake Superior to the western boundary of
51 Minnesota: Provided also, that lands shall not be granted under the provisions of this act on account of any railroad or part thereof constructed at the date of the passage of this act.

SEC. 5. And be it further enacted, That said "Northern Pacific railroad" shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line of the most substantial and approved description, to be operated along the entire line: Provided, that the said company shall not charge the Government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it on fair and equitable terms.

SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route

shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof,
52 and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale.

SEC. 7. And be it further enacted, That the said "Northern Pacific Railroad Company" be, and is hereby authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands and premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed, upon application of either party, to any court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to
53 be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners, such party shall pay the whole cost incurred by the appellee as

well as his own, and the payment into court, for the use of the owner, of said premises taken, as a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and of the right to use and occupy the same for the construction, maintenance and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by any infant, *femme covert*, *non compos*, insane person, or persons residing without the territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to
54 discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee-simple shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring title to, the same; but the judge of the court hearing said suit shall determine the kind of notice to be served on such owner or owners, and he may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land all claims to damage against said company shall be barred.

SEC. 8. And be it further enacted, That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

SEC. 9. And be it further enacted, That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one
55 year, then, in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things

which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. And be it further enacted, That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage or lien made in any way except by consent of the Congress of the United States.

SEC. 11. And be it further enacted, That said Northern Pacific railroad, or any part thereof, shall be a post-route and a military road, subject to the use of the United States for postal, military, naval, and all other Goverment service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

SEC. 12. And be it further enacted, That the acceptance of the terms, conditions and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States.

SEC. 13. And be it further enacted, That the directors of said company shall make an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors; and they shall, from time to time fix, determine and regulate the fares, tolls and charges to be received
56 and paid for transportation of persons and property on said road, or any part thereof.

SEC. 14. And be it further enacted, That the directors chosen in pursuance of the first section of this act shall, as soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and as soon as may be after their election, choose a treasurer and a secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security, as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

SEC. 15. And be it further enacted, That the president, vice-president and directors shall hold their offices for the period indicated in the by laws of said company, not exceeding three years respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such

election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper, touching the disposition and management of the stock, property, estate and effects of the company, the transfer of shares, the duties and conduct of their
57 officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

SEC. 16. And be it further enacted, That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such time and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph line within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Philadelphia and Chicago; and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

SEC. 17. And be it further enacted, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to, or conferred upon, said company by the Congress of the United States, by the legislature of any State, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid or assistance to
58 its own use for the purpose aforesaid.

SEC. 18. And be it further enacted, That said Northern Pacific Railroad Company shall obtain the consent of the legislature of any State through which any portion of said railroad line may pass, previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature.

SEC. 19. And be it further enacted, That unless said Northern Pacific Railroad Company shall obtain *bona fide* subscriptions to the stock of said company to the amount of two million of dollars,

with ten per centum paid within two years after the passage and approval of this act, it shall be null and void.

SEC. 20. And be it further enacted: That the better to accomplish the object of this act, namely, to promote the public interests and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act.

Approved July 2, 1864."

VIII.

That for the purpose of complying with the requirements of section twelve of said act of Congress of July 2, 1864, the said Northern Pacific Railroad Company duly accepted the terms, conditions, and impositions of said act in writing, under its corporate seal, executed pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such written acceptance on the President of the United States.

59 VIII*b*.

That by a joint resolution approved May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgage, and for other purposes," the Congress of the United States provided as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchise as a corporation; and as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct under the provisions and with the privileges, grants and duties provided for in its act of incorporation its main road to some point on Puget sound via the valley of the Columbia river with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound; and in the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter then said company shall be entitled under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory within ten miles on each side of said road beyond the limits prescribed

in said charter as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and
60 sixty-four to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July 2, 1864. And that twenty-five miles of said main line between its western terminus and the city of Portland in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points: Provided, that all lands hereby granted to said company, which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like all other lands at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceedings, or the mortgaged lands hereby granted or any of them be sold by the trustees to whom such mortgages may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale at places within the States and Territories in which they shall be situate after not less than sixty days' previous notice in single sections or subdivisions thereof to the highest and best bidder.

Provided further, that in the construction of the said railroad American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

SEC. 2. And be it further resolved, That Congress may at any time alter or amend this joint resolution having due regard for the rights of said company and any other parties."

61 VIIIc.

That thereafter the legislature of the State of Minnesota passed an act which was duly approved on the 2nd day of March, 1865, entitled "An act to aid in the construction of the 'Northern Pacific railroad and telegraph line' from Lake Superior to Puget's sound," being chapter 69 of the special laws of Minnesota for the year 1865; which said act is in the words and figures following, to wit:

"Whereas, the Congress of the United States of America did, by an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route,' approved the second day of July, 1864, create a body politic and corporate by the name, style and title of the 'Northern Pacific Railroad Company,' and, among other things, did authorize and empower said company to lay out, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin,

thence westerly by the most eligible railroad route to be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus, and did also vest in said company all the rights, powers, privileges and immunities necessary to carry into effect the purposes of said act as therein set forth.

And whereas, the Congress of the United States did also, by said act, authorize said Northern Pacific Railroad Company to accept, hold and enjoy to its own use any grant, donation, loan,
62 powers, franchise, aid or assistance which might be granted to said company by the Congress of the United States, by the legislature of any State, or by any corporation, person or persons, for the purposes of said act.

And whereas the said Northern Pacific Railroad Company was also required by said act to obtain the consent of the legislature of any State through which any portion of said railroad line might pass previous to commencing the construction thereof; now, therefore

Be it enacted by the legislature of the State of Minnesota:

SEC. 1. That the consent of the State be and the same is hereby given to the said Northern Pacific Railroad Company to survey, lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances within its limits, on the line in said act of Congress authorized; and for the purposes aforesaid in said act of Congress set forth, and in order to carry the same into full effect, the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities, within the limits of this State, which are by said act of Congress conferred upon them within the territories and jurisdiction of the United States, subject to the conditions in said act contained, and to the following proviso: Provided, that should the said company elect to make the eastern terminus of said road east of the eastern boundary of the State of Minnesota, then, and in that case, they shall construct, or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the State of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights and privileges are hereby granted to said company as they have or may have to construct said main line within the State of Minnesota: And provided further, that nothing in this
63 act contained shall be construed as exempting the road-bed and other property of said company within this State from taxation."

That thereafter the legislature of the State of Wisconsin passed an act, duly approved on the 10th day of April, 1865, entitled "An act to authorize the Northern Pacific Railroad and Telegraph Company, incorporated by an act of Congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake

Superior to Puget's sound, on the Pacific coast, by the northern route,' approved July 2d, 1864, to construct their railroad and telegraph line through the State of Wisconsin," being chapter 465 of the private and local laws of Wisconsin for the year 1865; which act is in the words and figures following, to wit:

"SEC. 1. The consent of the State of Wisconsin is hereby given to the Northern Pacific Railroad Company, incorporated by an act of Congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route,' approved July 2d, 1864, to survey, lay out, locate, construct, finish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, within its limits, on the line within the said act of Congress indicated and authorized; and for the purposes aforesaid, and in said act of Congress set forth, and in order to carry the same into full effect, the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities within the limits of this State which are by said act of Congress conferred upon them within the territories and jurisdiction of the United States: Provided, that said Northern Pacific Railroad Company shall be prohibited at any time prior to the actual building or equipment of said railroad, from allowing any railroad company chartered by the laws of the State of Minnesota, to use
64 or enjoy any of the privileges hereby granted to the Northern Pacific Railroad Company, to be exercised in the State of Wisconsin: And provided further, that nothing herein contained shall be construed to prevent the said Northern Pacific Railroad Company, after the building and equipment of said road through the State of Wisconsin, from making such contracts for connections with Minnesota railroads, in the State of Wisconsin (as) they may deem proper.

SEC. 2. This act shall take effect and be in force from and after its passage and publication."

IX.

That thereafter and for the purpose of ascertaining the most practicable route for a railroad to be constructed under the provisions of said act of Congress of July 2, 1864, from a point on Lake Superior in Minnesota or Wisconsin to Puget's sound, the Northern Pacific Railroad Company caused exploring and surveying parties to be put into the field during the years 1866, 1867, 1868, and 1869; and during these years said surveying parties, acting for said Northern Pacific Railroad Company, made surveys of various lines for railroad routes, commencing at about ten different points on Lake Superior and extending westwardly therefrom; and said parties also explored and investigated the country north of the forty-fifth degree of latitude and west of said various points on Lake Superior, and from time to time reported to the board of directors of said Northern Pacific Railroad Company the results of such surveys and explorations; that neither the board of directors nor the officers of said Northern Pacific Railroad Company were possessed of sufficient

knowledge or information to fix upon or determine a practicable route for the railroad contemplated by said act of Congress of July 2, 1864, prior to the making of the surveys and explorations as above set forth.

65 X.

That thereafter and on the 2nd day of February, 1870, the board of directors of the said Northern Pacific Railroad Company, by resolution duly adopted, directed the executive committee of said railroad company to locate the line of said Northern Pacific railroad, and thereafter the executive committee located the general route of said railroad from the mouth of the Montreal river, a point on Lake Superior in the State of Wisconsin, westward over and across the States of Wisconsin and Minnesota to a point on the Red River of the North, on the western boundary of said State of Minnesota, near Fargo, in the then Territory of Dakota; and thereupon and on the 13th day of August, A. D. 1870, under the directions of the board of directors of said Northern Pacific Railroad Company, there was transmitted to the Secretary of the Interior a certain map or plat showing the proposed general route of the said railroad according to said location thereof from the mouth of the Montreal river, a point on Lake Superior in the State of Wisconsin, westwardly over and across the said States of Wisconsin and Minnesota to said point on the Red River of the North near Fargo; that Respondent's Exhibit "1," hereto attached and made a part of this stipulation, shows the location of the line of general route as indicated upon said map so transmitted to the Secretary of the Interior on the 13th day of August, 1870.

That the Secretary of the Interior, upon the receipt of said map or plat, transmitted the same to the Commissioner of the General Land Office, together with another map of a portion of said road in the Territory of Washington, and at the same time wrote and transmitted to the said Commissioner of the General Land Office a letter in words and figures following, to wit:

66 "DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *August 13th*, 1870.

SIR: I transmit herewith two maps showing the designated route of the Northern Pacific railroad.

You will immediately direct the proper local officers in the States of Wisconsin and Minnesota to withhold from sale, pre-emption, homestead, and other disposal the odd-numbered sections not sold, reserved, and to which prior rights have not attached within twenty miles on each side of the route, and in like manner direct those officers in Washington Territory to withhold such odd-numbered sections as lie south of the town of Stilacoom. The unsurveyed as well as surveyed lands will be included in the reservation, and you will direct the local officers to give notice accordingly, and as the township plats are received by them they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

Very respectfully, your ob't servant,

J. D. COX, *Secretary.*

Hon. Jos. S. Wilson, Com'r of the Gen'l Land Office."

XI.

That thereafter the Commissioner of the General Land Office caused to be prepared a diagram showing all odd-numbered sections of land lying within twenty miles of the line of general route in the State of Wisconsin, as indicated on said map so transmitted to the Secretary of the Interior on the 13th day of August, A. D. 1870, as aforesaid, and the said Commissioner, on the 15th day of November, 1870, transmitted said diagram to the United States district land officers of the land office at Bayfield, Wisconsin, together with a letter of instructions in the words and figures following, to wit:

67 "DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *September 15th*, 1870.

Register and receiver, Bayfield, Wis.

GENTLEMEN: I transmit here a diagram showing the designated route of the Northern Pacific railroad under act July 2d, 1864, and by direction of the Secretary of the Interior you are requested to withhold from sale or location, pre-emption or homestead entry, all the odd-numbered sections of public lands falling within the limits of 20 miles, as designated on this map.

You will also increase in price to $2.50 per acre the even-numbered sections within those limits and dispose of them at that ratability under the pre-emption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully, JOS. S. WILSON,
Commissioner."

(Receipt acknowledged Sept. 27, 1870.)

XII.

That thereafter in all cases where cash payment was required under the laws of the United States the said district land officers required and demanded payment for all lands included in even-numbered sections alternate to said lands so withdrawn at the rate of $2.50 per acre, pursuant to said instructions of the Commissioner of the General Land Office, and the United States disposed of and received payment for large quantities of lands so situated at the rate of $2.50 per acre which otherwise would have been subject to acquisition under the land laws of the United States at the rate of $1.25 per acre.

68 XIII.

That thereafter the chief engineer of the Northern Pacific Railroad Company prepared a map, showing the proposed line of definite location of a portion of said railroad from a point on the St. Paul & Duluth railroad in section 1, township 48 north of range 17 west of the fourth principal meridian in the State of Minnesota, now known as Thomson Junction, eastwardly to a point in section 15, township 47 north of range 2 west of the fourth principal meridian in Wisconsin.

That on May 9, 1882, the executive committee of the board of directors of said Northern Pacific Railroad Company duly adopted the following resolution, to wit:

"The chief engineer having made and forwarded a map or plat of that part of the company's main line of railroad which extends from a point on said main line in section one of township forty-eight north, range seventeen west, of the fourth principal meridian in the State of Minnesota to the crossing of Red river to section fifteen of township forty-seven north, range two west, of said meridian in the State of Wisconsin, duly verified by his affidavit, on the seventeenth day of April, 1882, whereon is indicated by a red line the said definite location, and the same being carefully considered, it was, on motion of Mr. Harris,

Resolved, That the said map or plat be, and the same is hereby, approved, and the line of the Northern Pacific railroad as above described is hereby definitely fixed on and according to the said red line indicated and laid down on said map; and the president of the company is requested to certify the said plat and to cause it to be filed in the office of the Commissioner of the General Land Office."

That the said executive committee of the board of directors of said Northern Pacific Railroad Company was duly authorized by said company to take such action on its behalf.

69 XIV.

That thereafter and in accordance with said resolution of said executive committee the president of the said Northern Pacific Railroad Company duly certified said map showing said line of definite location by attaching thereto his certificate in words and figures following, to wit:

"Office of the Northern Pacific Railroad Company, No. 83 Broadway.

NEW YORK, 1882.

It is hereby certified that in pursuance of an act of Congress approved July 2, 1864, entitled "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," that map was made to show and does show the definite location of the line of the Northern Pacific railroad from a point on the main line in section 1, township 48 north, range 17 west of the

4th principal meridian, in the State of Minnesota, from the crossing of Bad river to section 15, township 47 north, range 2 west of the 4th principal meridian, in the State of Wisconsin, as definitely fixed and determined in compliance with said act of Congress and approved by the board of directors of said company by a resolution passed on the 9th day of May, 1882; and it is further certified that A. Anderson, whose signature is attached to the affidavit on this map, is and at the date of said affidavit was the duly appointed and empowered engineer-in-chief of the Northern Pacific railroad.

H. VILLARD,
President Northern Pacific Railroad Company.

Attest:
[SEAL.] SAM'L WILKINSON, *Secretary.*"

And there was attached to said map the affidavit of A. Anderson, engineer-in-chief of the Northern Pacific Railroad Company, in words and figures following, to wit:

70 "STATE OF MINNESOTA, } ss:
County of Crow Wing, }

A. Anderson, of Brainerd, in said county, deposes and says that he is the engineer-in-chief of the Northern Pacific railroad from Lake Superior to Puget sound; that the line of said railroad has been and is definitely located and fixed from a point on the main line of the Northern Pacific railroad in section 1, township 48 north, range 17 west of the 4th principal meridian, in the State of Minnesota, to the crossing of Bad river to section 15, township 47 north, range 2 west of the 4th principal meridian, in the State of Wisconsin.

A. ANDERSON,
Engineer-in-chief, Northern Pacific Railroad.

Sworn to and subscribed before me this 17th day of April, A. D. 1882.
[SEAL.] G. A. HOLLAND,
Notary Public."

That thereafter and on or about the 3rd day of July, 1882, in pursuance of said resolution of said executive committee, said president of said Northern Pacific Railroad Company duly transmitted said map of definite location, so certified by him and verified by said affidavit of said chief engineer, to the Secretary of the Interior, together with a letter in words and figures following, to wit:

"NEW YORK, *July 3rd,* 1882.

Hon. H. M. Teller, Secretary of the Interior, Washington, D. C.

SIR: I have the honor to inform you that I have today sent to your address, by express, the map or plat of the definite location of the main line of the Northern Pacific railroad from a point on the main line of said railroad at its junction with the St. Paul & Duluth

railroad, near the right bank of the St. Louis river, in the
71 State of Minnesota, thence in an easterly direction to a point in section 15, township 47 north, range 2 west of the 4th principal meridian, in the State of Wisconsin, lying and being partly in the State of Minnesota and partly in the State of Wisconsin.

The map is duly verified by the chief engineer and certified by me as the president of the company, and I respectfully request that it be transmitted to the Hon. the Commissioner of the General Land Office for filing in his office and for such necessary and appropriate action thereon as shall be in compliance with law and the practice of the department.

I beg leave to refer to section 3 of the act of Congress approved July 2, 1864, commonly known as the charter of the Northern Pacific Railroad Company.

I have the honor to be, very respectfully, your obed't servant,

H. VILLARD, *President.*"

XV.

That Exhibit 2 hereto attached and made a part of this stipulation shows the location of said line of definite location, as indicated upon said map so adopted by said resolution of said executive committee and so transmitted by the president of said railroad company to the Secretary of the Interior on said 3rd day of July, 1882.

That said Exhibit 2 also shows the line of route of the Lake Superior and Mississippi railroad extending from a point in town 47 N. of range 18 W. of the fourth principal meridian, in Minnesota, northeasterly to Duluth, as constructed prior to Jan. 1, 1872; that said line so indicating the Lake Superior and Mississippi railroad is marked on said exhibit "St. Paul and Duluth railroad."

XVI.

That thereafter and on July 2, 1882, the said map was duly transmitted to the Commissioner of the General Land Office by
72 the chief clerk of the Secretary of the Interior in accordance with the practice of the Department of the Interior, and on the 22nd day of November, A. D. 1882, the said Secretary of the Interior transmitted to the said Commissioner of the General Land Office a letter of instructions in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, *November* 22, 1882.

The Commissioner of the General Land Office.

SIR: In reply to your letter of the 5th ultimo, in relation to the adjustment of the withdrawal of lands for the benefit of the Northern Pacific Railroad Company under its grant of July 2, 1864, to conform to the line of route as definitely located, you are directed to make an adjustment of the route in accordance with the maps of definite location filed in 1881 and 1882, upon which the road is constructed from the boundary line between Dakota and Montana to the last crossing of the Yellowstone river and such other portions

of the road as have been definitely located without material deviation from the line of general route and where the road has been constructed.

The purpose is to permit the adjustment of the withdrawal of lands lying along so much of the railroad as has been constructed, as above described. This will carry out the direction of the President in approving the recommendation of this department that such portions of the Northern Pacific railroad as have been constructed in accordance with law be accepted and that patents be issued for the lands earned.

It appears that the maps of definite location filed as above show but slight divergence from former maps except where the line of the railroad enters the Crow reservation, in Montana, which deviation was authorized by the act of July 10, 1882 (22 Stat., 157).

Very respectfully, H. M. TELLER, *Secretary.*"

73 XVII.

That thereupon and on the 5th day of January, 1883, complying with the directions of the Secretary of the Interior, the Commissioner of the General Land Office prepared a diagram showing the line of said definite location and transmitted the same to the United States district land office at Bayfield, Wisconsin, together with a letter of instructions in the words and figures following, to wit:

"WASHINGTON, D. C., *Jan'y* 5, 1883.

Register and receiver, Bayfield, Wisconsin.

GENTLEMEN: On the 6th of July last, a map showing the definite location of the line of the Northern Pacific R. R. from a point on the main line in sec. 1, T. 48 N., R. 17 W., 4th P. M., in Minnesota, eastwardly to a point in sec. 15, T. 47 N., R. 2 W., in Wisconsin, was received in this office, with a letter from H. Villard, president of the company, to the Secretary of the Interior, dated the 3d of the same month. This map was certified by the chief engineer April 17th, and by the president of the company May 10th, 1882. Sept. 19th, 1882, a map of twenty-five miles of constructed road from the point first above mentioned to a point near Bluff creek, in the city of Superior, Wis., in sec. 32, T. 49 N., R. 13 W., was received, with department letter of the 18th, advising this office that said road had been accepted by the president. In a letter dated Nov. 22d, 1882, the Secretary directed that the withdrawals of land for the grant to said N. P. R. R. Co. be adjusted in accordance with the map
74 of definite location where there is no material variation from the line of general route and where the road has been constructed. The line of definite location upon which the section above mentioned has been constructed does not follow the general route exactly, but the greatest divergence from that line is not more than five or six miles, and under the ruling in similar cases this is not considered a material variation. A diagram showing the twenty, thirty, and forty mile limits of the grant opposite said constructed road, adjusted to the line of definite location, as well as the twenty-

mile limit of the withdrawal on general route, has been prepared, and I enclose a copy of so much thereof as relates to lands in your district.

Said limits are designated as follows: The twenty-mile definite limit is shown by a line shaded yellow; the thirty-mile limit by a red line; the forty-mile limit by a green line, and the twenty-mile limit of general route by a blue line. You are directed to withhold from sale or entry all the odd-numbered sections to the extent of the forty-mile (green) line. The even-numbered sections within the new twenty-mile (yellow) limit will be held subject to pre-emption, homestead, or timber-culture entry (if naturally devoid of timber) only, and where taken by pre-emption at the rate of $2.50 per acre, except where settlement was prior to the date of the receipt by you of this order.

The even-numbered sections between the new twenty and forty mile limits will also be held subject to entry as above, but at the rate of $1.25 per acre, with the exception of such tracts as are
75 now held at the double minimum price because of other grants for railroad purposes, and such as are outside the new twenty-mile limit and inside the twenty-mile limit of general route will, so far as not affected by withdrawals for other grants, be reduced to $1.25 per acre. The rights of other companies will not be affected by this order, neither will the withdrawal hereby made change the status of lands withdrawn on general route beyond the terminal limit shown on the diagram. Report promptly the receipt of this letter and diagram.

Very respectfully, L. HARRISON,
Acting Commissioner."

(Receipt ack'g'd Jan'y 11th, 1883.)

XVIII.

That on the 17th day of May, 1883, the Secretary of the Interior further instructed the Commissioner of the General Land Office to withdraw all odd-numbered sections of public land coterminous with and situated within thirty miles of said line of definite location of said railroad, as shown upon said map so filed as aforesaid, without reference to the actual construction of said railroad.

That thereupon and on the 22nd day of June, 1883, the Commissioner of the General Land Office, complying with the instructions of the Secretary of the Interior, made and issued an order to the United States district land officers at Bayfield, Wisconsin, in words and figures following, to wit:

"WASHINGTON, D. C., *June* 22, 1883.

Register and receiver, Bayfield, Wisconsin.

76 GENTLEMEN: A map showing the line of the Northern Pacific R. R., as definitely located from a point in section 1, T. 48 N., R. 17 W., in the State of Minnesota, eastward to a point in section 15, T. 47 N., R. 2 W., Wisconsin, was received in this office July 6th, 1882, with a letter, dated 3d same month, from H. Villard,

president of said company, to the Secretary of the Interior, referred by the chief clerk of the department July 5th, 1882.

Pursuant to the decision of the Hon. Secretary of the Interior, dated Nov. 22, 1882, you were directed by letter of Jan'y 5, 1883, to withdraw from sale or entry the odd-numbered sections opposite that portion of the line shown on said map upon which the road had been constructed to the extent of the twenty and thirty mile limits fixed by the granting act of July 2, 1864 (13 Stats., 365), and the additional ten-mile limit provided by the joint resolution of May 31, 1870 (16 Stats, 378). Under date of 17th ult., the Secretary decided that withdrawals of land opposite the line of definitely located road should be ordered, but in future only to the extent of the first indemnity belt, the limits of which are fixed by the act of 1864 at thirty miles on each side of the line adopted through the States. I transmit herewith a diagram showing the twenty-mile (granted) and thirty-mile (indemnity) limits extended east opposite said definitely located line from their connection with the same limits of the withdrawal of 5th Jan'y last, so far as they fall within your district, and also the twenty-mile limit of the
77 withdrawal ordered Sept. 15, 1870, upon the filing of the map of general route of said road in this office.

The twenty-mile limit of definite location is designated by a line shaded blue and the thirty-mile limit by one shaded brown, while the twenty-mile limit of general route is shown by one of a neutral tint.

You are instructed to withhold from sale or entry all the land in odd-numbered sections to the extent of the thirty-mile (brown) limits not already withdrawn. The even-numbered sections falling within the new twenty-mile (blue) limit will be held subject to entry only under the pre-emption and homestead laws or the timber-culture act, if subject to entry under said act, and where taken by pre-emption or commuted homestead entries payment must be made at the rate of $2.50 per acre, unless in the former case settlement was made prior to the receipt by you of the order increasing the price of land. So far as this grant is concerned, the even-numbered sections within the twenty-mile limit of general route which now fall between the twenty and thirty mile limits of definite location will be reduced to $1.25 per acre, and will, with the other even sections between said limits, be held subject to entry as above at that price *subject to entry as above at that price* where they have not been increased to double minimum by withdrawals for other grants.

The rights of companies claiming under other grants will not be affected by this order of withdrawal. Report promptly the date of receipt by you of this letter and accompanying diagram.

78 Very respectfully, N. C. McFARLAND,
Commissioner."

(Received at Bayfield June 26, 1883.)

XIX.

That thereafter and on the 8th day of October, A. D. 1883, the Secretary of the Interior instructed the Commissioner of the Gen-

eral Land Office to withdraw and withhold from sale or entry or pre-emption all odd-numbered sections of public land coterminous with and situated within forty miles of said line of definite location as shown upon said map of definite location so filed as aforesaid, and thereafter and on the 20th day of October, A. D. 1883, in pursuance of said instructions of the Secretary of the Interior, the Commissioner of the General Land Office made and issued an order to the United States district land office at Bayfield, Wisconsin, in words and figures following, to wit:

"WASHINGTON, D. C., *Oct.* 20, 1883.

Register and receiver, Bayfield, Wisconsin.

GENTLEMEN: Under date 8th inst. the Hon. Secretary of the Interior instructed this office to withdraw lands for the benefit of the grant to the Northern Pacific Railroad Co. opposite the line of said company's road as definitely located in the States to the extent of the second or forty-mile indemnity limits.

The withdrawal opposite said line as definitely located eastward from Superior, Wis., ordered by my letter to you dated 22d
79 June last, included only lands in the twenty-mile (granted) limits and the first or thirty-mile indemnity limits.

I enclose a diagram showing the limits of said withdrawal and the additional forty-mile or second indemnity limits (shown by lines shaded red), and, pursuant to the instructions of the Hon. Secretary, you are directed to withdraw from sale or entry all the odd-numbered sections falling within said forty-mile limits, which should be laid down on the diagrams sent you June 22d.

This order will not affect the rights of other companies for which withdrawals of land in said limits have been ordered; neither will it change the status of the even-numbered sections falling in said limits. Report promptly the date of receipt by you of this order and the accompanying diagram.

Very respectfully, N. C. McFARLAND,
Commissioner."

(Rec'd Oct. 25, 1883, at 12 o'clock m.)

XX.

That thereafter and on the 20th day of August, A. D. 1884, the board of directors of the Northern Pacific Railroad Company adopted the following resolution, to wit:

"Resolved, That the eastern terminus or the point of beginning of the Northern Pacific Railroad Company on Lake Superior be, and the same is hereby, fixed, determined, and established at a point at the city of Ashland, on Lake Superior, in the county of
80 Ashland, in the State of Wisconsin, in section 27, township 48 north of range 4 west of the fourth principal meridian."

That thereafter and on or about the 3rd day of December, 1884, the said Northern Pacific Railroad Company transmitted a copy of said resolution, duly certified by its secretary, under the corporate seal of said company, to the Commissioner of the General Land Office.

XXI.

That thereafter the Commissioner of the General Land Office prepared a diagram showing the final eastern terminal limit of said line, and transmitted the said diagram to the United States district land officers at Ashland, Wisconsin, land office, together with a letter of instructions in the words and figures following, to wit:

"WASHINGTON, D. C., *Feb.* 3, 1887.

Register and receiver, Ashland, Wisconsin.

GENTLEMEN: By office letter of September 15, 1870, addressed to the local officers at Bayfield, Wis., a withdrawal of lands in their district was ordered for the benefit of the Northern Pacific Railroad Company under act of July 2, 1864 (13 Stat., 365), which withdrawal has been known as the withdrawal on general route—*i. e.*, a withdrawal ordered upon a map filed as map of general route.

July 6, 1882, the president of said company (Henry Villard, Esq., of New York city) filed a map purporting to be a map of
81 definite location, showing that part of the road definitely located in the State of Wisconsin, whereupon this office, by letter of Jan'y 5, 1883, transmitted to the register and receiver at Bayfield a diagram showing the limits of the grant in their district as adjusted to the definite location of the road, whereby additional lands were withdrawn, and the price of some lands falling outside the 20-mile limits of definite location, but which were within the twenty-mile limits on general route, were reduced in price to $1.25 per acre.

By letter of December 3, 1884, George Gray, Esq., general counsel of the Northern Pacific Railroad Company, transmitted to this office a duly certified copy of a resolution adopted by the board of directors of said company at a meeting held Aug. 28, 1884, as follows, to wit: 'Resolved, That the eastern terminus or the point of beginning of the Northern Pacific railroad on Lake Superior be, and the same is hereby, fixed, determined, and established at a point at the city of Ashland, on Lake Superior, in the county of Ashland, in the State of Wisconsin, in section 27, township 48 north, range 4 west, of the fourth principal meridian.'

The eastern terminus of the line of the Northern Pacific railroad having thus been determined and established, I have caused to be prepared a diagram showing the final eastern terminal limit of the grant to said company as fixed by this office.

A copy of said diagram is herewith enclosed. It also shows the limits of the aforesaid withdrawals in your district east of range 5 west.

The terminal limit having thus been definitely fixed, all
82 lands east thereof are released from the operation of all withdrawals for the Northern Pacific Railroad Company, but, as the same are within the limits of a prior withdrawal for the Wisconsin Central Railroad Company, the odd-numbered sections will not, of course, be restored to entry. The even-numbered sections east of said terminal limits which have heretofore been withdrawn

as within the 20-mile granted limits of the N. P. R. R. will be held at $1.25 per acre, where same are not double minimum, by reason of being within the granted limits of the Wisconsin Central railroad.

Please acknowledge receipt hereof.

Respectfully, WM. A. J. SPARKS,
Commissioner."

That Respondent's Exhibit 3, hereto attached and made a part of this stipulation, is a true and correct copy of said diagram so prepared by said Commissioner of the General Land Office and so transmitted to the United States district land officers at Ashland, Wisconsin.

XXII.

That said point at Ashland so fixed by said resolution of the board of directors of said Northern Pacific Railroad Company as the initial point of said railroad is on the line of the definite location of said railroad, as shown by the map thereof filed in the office of the Commissioner of the General Land Office on the 6th day of July, A. D. 1882, as aforesaid, and said point at Ashland is situated about twelve miles west of the most easterly point on said map of definite location so filed on the 6th day of July, 1882.

83 XXIII.

That the said Northern Pacific Railroad Company constructed a continuous line of railroad from said city of Ashland to Puget's sound, on the Pacific coast, in all respects as required by said act of Congress of July 2, 1864, and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof, and the whole of said line of railroad was duly accepted by the President of the United States as provided in said act of Congress of July 2, 1864.

That said railroad was constructed eastward from the village of Thomson, Carlton county, Minnesota, to said city of Ashland, in the State of Wisconsin, as hereinafter more fully set forth; that said railroad was in a like manner constructed westward from said village of Thomson to a point fifty-five miles west of the city of Helena, Montana; said railroad was constructed eastward from Wallula junction, a point in the Territory, now State, of Washington, east of the Cascade mountains, to said point fifty-five miles west of the city of Helena; that said line so constructed west from said village of Thomson and said line so constructed east from said Wallula junction met and were united at said point fifty-five miles west of the city of Helena in the month of August, 1883.

That thereafter and during the years 1885, 1886, and 1887 said Northern Pacific Railroad Company constructed its line from a point on said line theretofore constructed about sixteen miles north
84 of said Wallula junction over and across the Cascade mountains to the city of Tacoma, in the Territory, now State, of Washington, on Puget sound; that said line from Wallula junction to Tacoma was completed in the month of August, 1887; that

Respondent's Exhibit "4" shows the line of the Northern Pacific as constructed, together with branch lines operated in connection with said railroad.

XXIV.

That the portion of said railroad extending from said point at the city of Ashland to said Thomson junction, in the county of Carlton, in said State of Minnesota, was constructed on said line of definite location so fixed as aforesaid and shown on Respondent's Exhibit 2 during the years 1881, 1882, 1883, and 1884, and was examined in three sections by commissioners appointed by the President of the United States as provided in said act of Congress of July 2, 1864.

That the first of said sections so examined by said commissioners extended from said Thomson junction, in the State of Minnesota, to a point on Bluff creek, within the corporate limits of Superior city, in the State of Wisconsin, a distance of twenty-five miles; that said section was constructed in the years 1881 and 1882; that the said commissioners, after examining the said section of railroad extending from said Thomson junction to said Bluff creek, duly reported to the Secretary of the Interior that the same was constructed in compliance with said act of Congress of July 2, 1864; and thereupon the Secretary of the Interior, on the 14th day of September, 1882, transmitted said report of said commissioners to the
85 President of the United States, together with a letter recommending that said report be approved and said last-mentioned section of said railroad be accepted by the President according to the provisions of the said act of Congress of July 2, 1864; that said letter so transmitted by the Secretary of the Interior with said report of said commissioners is in the words and figures following, to wit:

"WASHINGTON, *14th Sept.*, 1882.

SIR: I have the honor to submit herewith the report of Messrs. Harvey W. Scott, John P. Sanborn, and Arthur B. Johnson, whom you appointed commissioners to examine two hundred and twenty-five miles of the Northern Pacific railroad. They report said sections (two hundred miles in the Territory of Montana, beginning at a point on the south bank of the Yellowstone river about one and a half miles west of O'Fallon's creek and ending at a point on the west bank of Canon creek, seven miles west of the town of Billings, in sec. 22, T. 1 S., R. 25 E., Montana meridian, and twenty-five miles, beginning at the Northern Pacific junction near Thompson, Minnesota, and ending at or near Bluff creek, in Superior, Wisconsin), as constructed in substantial compliance with the requirements of law and the instructions of this department, and the same of the telegraph line along said sections of railroad.

I therefore recommend that you accept said two hundred and twenty-five miles of railroad, and that patents for lands
86 earned by its construction be issued by the Northern Pacific Railroad Company on their compliance with the law in such

cases made and provided and with the decision of this department of the 5th of June last.

Very respectfully, H. M. TELLER, *Secretary.*

The President, 2731–M–'2."

That thereupon the President of the United States considered the report of said commissioners and said recommendation thereon of the Secretary of the Interior, and thereupon and on the 16th day of September, 1882, approved said recommendations and endorsed his approval thereon in writing in the words and figures following, to wit:

"EXECUTIVE MANSION, *September* 16, 1882.

The within recommendations are approved.

CHESTER A. ARTHUR."

That the second of said sections so examined by said commissioners extended from said Bluff creek, a point in town of Superior, Wisconsin, in the northeast quarter of section thirty-two (32), township forty-nine (49) north, of range thirteen (13) west, eastwardly to a point about three-fourths of a mile east of Brule river, in the southwest quarter of section thirteen (13), township forty-seven (47) north, of range ten (10) west, of the fourth principal meridian, Wisconsin, a distance of twenty-five miles; that said second section extends over and across the north half of the southwest quarter of section four (4), township forty-seven (47), range eleven (11), Douglas county, Wisconsin, being the land described in the petition herein; that said second section
87 was constructed in the latter part of the year 1883; that the said commissioners, after examining the said section of said railroad, duly reported in writing to the Secretary of the Interior on the 30th day of January, 1884, that said section was constructed in compliance with said act of Congress of July 2, 1864, and the Secretary of the Interior transmitted said report of said commissioners to the President of the United States, together with a letter recommending that said report be approved and said last-mentioned section of said railroad be accepted by the President according to the provisions of the said act of Congress of July 2, 1864; that said letter so transmitted by the Secretary of the Interior with said report of said commissioners is in the words and figures following, to wit:

"WASHINGTON, 30*th Jan'y*, 1884.

SIR: I have the honor to submit herewith the report of Messrs. Hezekiah Watkins, Frank H. Truesdell, and John O. Wyman, whom you appointed commissioners to examine twenty-five miles of the Northern Pacific railroad and telegraph line in Wisconsin.

Said sections begins in the town of Superior, Wisconsin, at a point in the N. E. ¼ of sec. 32, T. 49 N., R. 13 west, runs eastwardly and ends at a point about three-fourths of a mile east of Brule river in the S. W. ¼ of sec. 13, T. 47 N., R. 10 W., of 4th principal meridian, Wisconsin.

The commissioners report said section as constructed in substantial compliance with law and the instructions of this department.

I therefore recommend that you accept said section, and that
88 patents for lands earned by its construction be issued to the Northern Pacific Railroad Company on their compliance with the laws and regulations in such cases provided.

Very respectfully,

H. M TELLER, *Secretary.*"

The President, 472–1884.

That thereupon the President of the United States considered the report of said commissioners and said recommendation thereon of the Secretary of the Interior, and thereupon and on the 31st day of January, 1884, approved said recommendations and endorsed his approval thereon in writing in the words and figures following, to wit:

"EXECUTIVE MANSION, *January* 31, 1884.

The within recommendations are appoved.

CHESTER A. ARTHUR."

That the third of said sections so examined by said commissioners extended from the town of Ashland, Wisconsin, a point on Lake Superior, in section twenty-seven (27), township forty-eight (48) north, of range four (4) west, of the fourth principal meridian, westwardly to a point in the southwest quarter of section thirteen (13), township forty-seven (47) north, of range ten (10) west, same meridian, Wisconsin, a distance of thirty-seven and one-half miles; that the said commissioners, after examining the said section of said railroad, duly reported to the Secretary of the Interior that the same was constructed in compliance with said act of Congress of July 2, 1864;

and thereupon the Secretary of the Interior, on the 6th day
89 of February, 1885, transmitted said report of said commissioners to the President of the United States, together with a letter recommending that said report be approved and said last-mentioned section of said railroad be accepted by the President according to the provisions of the said act of Congress of July 2, 1864; that said letter so transmitted by the Secretary of the Interior with said report of said commissioners is in the words and figures following, to wit:

"WASHINGTON, *6th February*, 1885.

SIR: I have the honor to submit herewith the report of Messrs. C. G. Barber, Nathan G. King, and George B. Welch, whom you appointed commissioners to examine a section of thirty-seven and one-half miles of the Northern Pacific railroad and telegraph line in Wisconsin.

Said section begins near the towns of Ashland, in sec. 37, T. 48 N., R. 3 W., 4th principal meridian, runs westwardly, and ends at a point in the S. W. ¼ of sec. 13, T. 47 N., R. 10 W., same meridian, Wisconsin.

The commissioners report said section as constructed in substantial compliance with law and the instructions of this department.

I therefore recommend that you accept said sections, but that no patents for lands lying coterminous with said section shall issue until specific orders so to do be given by you.

Very respectfully, H. M. TELLER, *Secretary.*"

The President.

That thereupon the President of the United States considered the report of said commissioners and said recommendation
90 thereon of the Secretary of the Interior, and thereupon and on the 16th day of February, 1885, approved said recommendation and endorsed his approval thereon in writing in the words and figures following, to wit:

"EXECUTIVE MANSION, *February* 6, 1885.

The above recommendations are approved.

CHESTER A. ARTHUR."

XXV.

That the map or plat hereto attached and marked "Petitioner's Exhibit A" is a true and correct copy of a certain map or plat now in the office of the Commissioner of the General Land Office, and unless the original of said map or plat marked Exhibit "A" has been altered or changed since March 6, 1865, the original of said map or plat, as shown by Exhibit "A," was transmitted by Josiah Perham, the president of the Northern Pacific Railroad Company, to the Secretary of the Interior March 5, 1866.

That the original of said map or plat marked Exhibit "A" shows upon its face, as indicated by said copy, a wavy red line extending along and over the lower of the two red lines shown on said Exhibit "A" extending westward from Lake Superior.

That with the original of said Exhibit "A," or if the same has been altered since March 6, 1865, then with the said original map as it existed on said last-mentioned date, the said Josiah Perham transmitted to the Secretary of the Interior a letter in the words and figures following, to wit:

91 "WASHINGTON, D. C., *6th March*, 1865.

Hon. J. P. Usher, Secretary of the Interior.

DEAR SIR: Under authority of the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget sound, in Washington Territory, via the Columbia river, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that

under your directions the lands granted to said company may be marked and withdrawn from sale, in conformity to law.

I am, respectfully, your ob't servant,

JOSIAH PERHAM,
Pres. N. P. R. R. Company."

That thereupon the Secretary of the Interior transmitted the original of said map marked Exhibit "A," together with said letter of the said Josiah Perham, to the Commissioner of the General Land Office on March 9, 1865, together with a letter in the words and figures following, to wit:

"WASHINGTON, D. C., *March* 9, 1865.

"SIR: Herewith I transmit a map upon which the 'general line' of the Northern Pacific railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy
92 of the letter of the president of said company dated the 6th instant, requesting that the granted lands along said line be withdrawn from market.

In view of the provisions of the 3rd and 6th sections of the act of Congress approved July 2nd, 1864 (pamphlet laws, pages 368, 369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget sound, may be withdrawn, as requested, as preliminary to the final survey and location of said railroad.

The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of Congress.

Very respectfully, your ob't serv't,

J. P. USHER, *Secretary.*

The Commissioner of the General Land Office."

(That the said Exhibit "A," mentioned in the foregoing paragraph, shall be subject to the objections on the part of the respondent, The Northern Pacific Railway Company, noted at the close of this stipulation.)

XXV*A*.

That there is among the files in the office of the Commissioner of the General Land Office a map, dated 1867, marked, "To accompany the report of Edwin P. Johnson, chief engineer Northern Pacific railroad;" that across the face of said map is drawn
93 a line along the route of the road from Lake Superior to Puget sound, with two initial points, one starting at Bayfield, on Lake Superior, in Wisconsin, near the northeastern boundary thereof; the other at Superior City, on Lake Superior, near the western boundary of Wisconsin.

XXV*b*.

That by an act approved May 5, 1864, entitled "An act making a grant of lands to the State of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior," the Congress of the United States enacted as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That there be, and there is hereby, granted to the State of Minnesota for the purpose of aiding in the construction of a railroad in said State from the city of St. Paul to the head of Lake Superior every alternate section of public land of the United States, not mineral, designated by odd numbers, to the amount of five alternate sections per mile on each side of the said railroad on the line thereof, within the State of Minnesota, but in case it shall appear that the United States have, when the line of route of said road is definitely fixed, sold, appropriated, reserved, or otherwise disposed of, any sections, or any part thereof, granted as aforesaid, or that the right of pre emption or homestead settlement has attached to the same, then it shall be the duty of the Secretary of the Interior to select from the lands of the United States nearest to the lines of sections above specified, in alternate sections or parts thereof, so much pubiic land of the United States, not mineral, as shall
94 be equal in amount to such lands as the United States have sold or otherwise appropriated or to which the rights of pre-emption or homestead settlement may have attached as aforesaid; which lands thus selected in lieu of those sold, reserved, or otherwise appropriated or disposed of, or to which the rights of pre-emption or homestead settlement may have attached, as aforesaid, together with the sections and parts of sections designated as aforesaid, and appropriated as aforesaid shall be held and disposed of, by the said State for the use and purpose aforesaid: Provided, that the land to be so selected shall in no case be located further than twenty miles from the lines of said road; and provided further, that the lands hereby granted for and on account of said roads, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: Provided, also that no part of the land granted by this act shall be applied to aid in the construction of any railroad, or part thereof, for the construction of which any previous grant of land may have been made by Congress; and provided further, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States, from the operations of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands; in which case the right of way only
95 shall be granted, subject to the approval of the President of the United States; provided further, that the minimum price

of the even sections and parts of sections of the public lands of the United States, within the limits of ten miles on each side of the lines of the said road, shall be two dollars and fifty cents per acre.

SEC. 2. And be it further enacted, That whenever said State shall cause to be completed twenty consecutive miles of any portion of said railroad, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first-class railroad, patents shall issue, conveying the right and title to said lands to said State, on each side of the road, as far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: Provided, however, that no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, certified by the governor of the State of Minnesota, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end.

SEC. 3. And be it further enacted, That when the said road shall be definitely located, and a plat thereof filed with the Secretary of the Interior, the lands hereby granted shall not thereafter be subject to settlement, pre-emption, or private entry adverse to this grant.

SEC. 4. And be it further enacted, That the said State in
96 addition to the grant heretofore mentioned, is hereby authorized to locate the said road over any public lands of the United States not otherwise appropriated, reserved, or disposed of, and that the right of way over said lands of the United States for the purpose aforesaid is hereby granted to said State, to the width of one hundred feet on each side of said road as located.

SEC. 5. And be it further enacted, That the said lands hereby granted, when patented to the said State, shall be subject to the disposal of said State, for the purposes aforesaid, and for no other; and the said railroad shall be and remain a public highway for the use of the Government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States.

SEC. 6. And be it further enacted, That if said road is not completed within eight years from the time of the passage of this act, as provided herein, no further patents shall be issued for said land, and no further sale shall be made, and the land unsold shall revert to the United States.

SEC. 7. And be it further enacted, That the United States mail shall be transported over said road, under the direction of the Post-Office Department, at such price as Congress may by law direct; Provided, that until such price is fixed by law, the Postmaster General shall have the power to determine the same.

SEC. 8. And be it further enacted, That any railroad which may hereafter be constructed from any point on the bay of Supe-
97 rior in the State of Wisconsin, shall be permitted to connect with the said railroad, for the construction of which the said

lands are hereby granted, at any point which may be selected by the president and directors of said railroad company so permitted to connect their said road, and the said company so permitted to connect, shall have the right and privilege to transport, or have transported, over the track of said railroad, for the construction of which the said lands are hereby granted, all or any of its cars, passengers, or freights and the said railroad company controlling the said road for the construction of which the said lands are hereby granted, shall have the same right and privilege to transport or have transported, all or any of its cars, freights or passengers, over the track of the said railroad of the company so permitted to connect, and said transportation shall be paid by the railroad company using, to the railroad company according the same, at the usual rates of charges which may be imposed by the said company upon all other cars, freights or passengers."

That by an act entitled "An act to execute the trust created by the act of Congress entitled 'An act making a grant of lands to the State of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior,' approved May 5, 1864, and to grant the said lands to the Lake Superior and Mississippi Railroad Company, to aid in the construction of its railroad and to amend and continue certain acts in relation to said railroad company," being chapter 11 of the Special Laws of Minnesota for the year 1865, the legislature of the State of Minnesota conferred upon the Lake Superior
98 and Mississippi Railroad Company, a corporation duly created and organized under the laws of the State of Minnesota, the rights, benefits, privileges, lands, and property granted to the State of Minnesota by virtue of the said act of Congress of the United States entitled "An act making a grant of lands to the State of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior," and thereupon and on the 25th day of February, 1865, said Lake Superior and Mississippi Railroad Company duly accepted the provisions of said last-mentioned act so passed by the legislature of the State of Minnesota.

XXVI.

That on January 1, 1872, the Lake Superior and Mississippi Railroad Company, a corporation created by and existing under the laws of the State of Minnesota, was the owner of and operating a line of railroad extending from the city of St. Paul, in the said State of Minnesota, by way of the village of Thomson, in Carlton county, in said State, to the city of Duluth, on Lake Superior, in said State of Minnesota, and on said last-mentioned date the said Northern Pacific Railroad Company purchased a half interest in that portion of said railroad owned by said Lake Superior and Mississippi railroad extending northward from the said village of Thomson to the city of Duluth, and said Lake Superior and Mississippi Railroad Company and said Northern Pacific Railroad Company, by their duly authorized officers, executed an agreement in writing in the words and figures following, to wit:

99 Lake Superior and Mississippi Railroad Company to Northern Pacific Railroad Company.

Deed.

Sale of one-half of road, etc., from near town of Thomson to center of Lake avenue, Duluth.

Dated JAN. 1, 1872.

This indenture, made the first day of January, in the year one thousand eight hundred and seventy-two, between the Lake Superior and Mississippi Railroad Company, a corporation created by and existing under the laws of the State of Minnesota, party of the first part, and the Northern Pacific Railroad Company, a corporation created by an act of Congress of the United States of America, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," approved July 2nd, 1864, and existing under said act and certain resolutions amendatory thereof, as well as under certain legislative acts of the States of Minnesota and Wisconsin, respectively, party of the second part.

Whereas, the said party of the first part is the owner of a certain line of railroad known as the Lake Superior and Mississippi railroad, which extends from the city of Saint Paul, in the State of Minnesota, to the city of Duluth, in the same State, and which, entering the city of Duluth, runs to a grain-elevator erected upon a
100 dock on the margin of the waters of Lake Superior, including a passenger and freight depot and numerous side tracks within said city.

And whereas, the said party of the second part is duly authorized by law to construct, or to acquire, and to maintain and operate a certain railroad which, if constructed as an independent line, would run into and through Duluth aforesaid, and to the waters of Lake Superior, aforesaid, and terminate at a point adjacent to the terminous of the said Lake Superior and Mississippi railroad.

And whereas, the railroad of the said party of the second part, commonly known as the Northern Pacific railroad, as the same is now located and constructed, connects with the said Lake Superior and Mississippi railroad near the town of Thomson, in Carlton county, in the said State of Minnesota, but has not been constructed into the said city of Duluth; and the said party of the second part has heretofore by agreement with the said party of the first part, done its transportation between the said point of connection of said roads and the water of Lake Superior over and by way of the said Lake Superior and Mississippi railroad.

And whereas, the said party of the second part, being desirous of permanently securing the right to use the portion of said railroad which extends from the said point of connection of said roads into Duluth as aforesaid, to the end that the necessity for the construction of the said Northern Pacific railroad from the said point of connection to the said city of Duluth may be obviated, has agreed to

purchase an undivided one-half interest in such portion of the said Lake Superior and Mississippi railroad for the price or sum
101 of five hundred thousand dollars in gold, payable, with interest, at the time and in the manner hereinafter set forth; and the said party of the first part has agreed to sell and convey the same to the said party of the second part, and to grant certain easements and rights of way over and in connection therewith.

And whereas, the said party of the first part heretofore executed and delivered to J. Edgar Thomson and William G. Moorehead, both of the city of Philadelphia, in the State of Pennsylvania, two several deeds of trust or mortgage of and upon all its railroad and other property, and the land grants connected therewith, to wit—a deed of trust or mortgage, bearing date on the first day of January, one thousand, eight hundred and sixty-nine, made to secure the payment of certain bonds of the said party of the first part, known as the first-mortgage seven per cent. land-grant bonds of the said party of the first part; which bonds amount in the aggregate to four million, five hundred thousand dollars, and are payable on the first day of January, one thousand, eight hundred and ninety-six, in gold coin of the United States of America, free of United States taxation, and bear interest payable semi-annually in the like gold coin, and also free of United States taxation; and a certain other deed of trust or mortgage, bearing date on the first day of April, one thousand eight hundred and seventy, made to secure the payment of certain other bonds of the said party of the first part, known as the second-mortgage seven per cent. land-grant bonds thereof, which second-mortgage bonds amount in the aggregate to three million, two hundred thousand dollars, and are pay-
102 able on the first day of October, one thousand, nine hundred in gold coin of the United States of America, free of United States taxation, and bear interest, payable semi-annually, in the like gold coin, and in like manner free of taxation.

And whereas, both of the said deeds of trust or mortgage are liens upon the railroad and premises, the use whereof the said party of the second part is desirous permanently to secure and in and to which the said party of the first part has agreed to sell and convey to the said party of the second part an equal undivided interest as aforesaid, so that, at the date hereof, the said party of the first part is unable to grant and convey to the said party of the second part, a good title to the said railroad and premises, free from all incumbrances.

Now, therefore, this indenture witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar to the said party of the second part duly paid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for and in consideration of the covenant and agreement of the said party of the second part to pay to the said party of the first part the further sum of five hundred thousand dollars, in gold coin of the United States of America, at the time and in the manner hereinafter mentioned and set forth, together with semi-annual interest thereon, the said party of the first

part has bargained and sold and by these presents doth bargain, sell, convey, assign, transfer and set over, unto the said party of the second part: All the equal undivided one-half part of all and singular that part or portion of the
103 railroad belonging to the said party of the first part, and known as the Lake Superior and Mississippi railroad, which extends from the point of connection thereof with the Northern Pacific railroad aforesaid, near the town of Thomson, in Carlton county, in the State of Minnesota aforesaid, to a point within the said city of Duluth where the said railroad intersects the centre line of Lake avenue, in said city, being a distance of twenty-six miles, more or less, including the road-bed of such hereby granted portion of said railroad, and the superstructure and tracks thereon, and the tracks, bridges, viaducts, culverts, fences and other structures, and all lands, buildings and premises used or held for use for depot or station purposes in connection with such portion of said railroad, including the passenger depot within the said city of Duluth, excepting, however, from the premises hereby granted, the lots numbered 2, 3, 4, 5, 6, and 7, in block "E," the lots numbered 1, 2, 3, and 4, in block "F," and the lots numbered 1, 2, 3, and 4 in block "H" on Rice's point in the said city of Duluth as such lots are laid down on a certain map of the said city of Duluth entitled "Map of Duluth, St. Louis Co., Minnesota," made by C. G. Franklin, C. E., of said city; which excepted premises embrace the round-house and turntable with the movable tracks connected therewith, and the machine shops and works and the engine-house and engine-house tracks belonging to the said party of the first part, which are situated upon Rice's point, aforesaid.

And this indenture further witnesseth, that for the consideration aforesaid, the said party of the first part has given, granted
104 and confirmed, and by these presents doth give, grant and confirm unto the said party of the second part, the right and privilege to lay down suitable and proper railroad side tracks and switches over and upon the unoccupied portions of said excepted lots, and to use the same so far and to the full extent that may be necessary to give the said party of the second part free ingress and egress for its traffic to the docks and property of the said party of the second part upon said lake.

And this indenture also witnesseth, that the said party of the first part has given, granted and confirmed, and by these presents doth give, grant and confirm unto the said party of the second part, the right, privilege and easement to run any and all grain trains, carrying traffic for the said party of the second part to and from the grain elevator on Minnesota point, in Duluth aforesaid, so that the said party of the second part may have equally with the said party of the first part the use of the tracks, laid and to be laid, of the said Lake Superior and Mississippi railroad, which extend from the center line of Lake avenue aforesaid to the grain elevator aforesaid for the purpose of delivering and receiving grain, but for no other purpose.

And this indenture further witnesseth, that the said party of the

first part has also given, granted and confirmed, and by these presents doth give, grant and confirm unto the said party of the second part, the further right and privilege of laying down over and upon so much of the land acquired or appropriated by the said party of the first part for the right of way of its said railroad as lies
105 between the center line of Lake avenue aforesaid and the eastern shore of Minnesota point aforesaid, and as constitutes a strip of land sixty feet in width, and bounded southerly by the southerly boundary line of the land so acquired or appropriated for such right of way; together with the right, privilege and easement of running trains over said tracks so to be laid down; but such right to use the tracks so laid down shall be common to both parties, so far as their respective traffic shall require.

Provided, however, and these presents and all the grants, rights and privileges therein mentioned are made and given upon the express condition, that the said party of the second part being suffered and permitted to remain in the quiet and peaceable enjoyment of the same shall and does, semi-annually, to wit: on or before the first day of July, 1872, and semi-annually thereafter in each and every year, pay over to the said party of the first part the sum of seventeen thousand and five hundred dollars in the gold coin of the United States of America, and in addition thereto such further sum as shall be equivalent to the United States taxes on seventeen thousand and five hundred dollars of the interest on the bonds first aforesaid; and provided further, that when the said bonds become due and payable the said party of the second part shall and does pay over to the said party of the first part, the just and true sum of five hundred thousand dollars in the gold coin aforesaid upon the lands and premises hereinbefore granted, being discharged from the said liens and from all other incumbrances theretofore created or suffered by the said party of the first part; provided, how-
106 ever, that the said party of the second part shall be entitled at any time at its own option to make payment of said sum of five hundred thousand dollars, although said bonds may not yet have become due; and provided further, that upon payment of the said principal sum of five hundred thousand dollars in gold to the said party of the first part, whether at or before the maturity of said bonds, with all interest accrued thereon, the said party of the second part shall become vested with the title to the premises hereinbefore granted freed and forever discharged from the conditions hereinbefore set forth.

To have and to hold, all and singular the lands and premises and the rights, privileges and easements hereinbefore granted unto the said party of the second part, its successors and assigns, forever, unless the said party of the second part shall make default in the observance and performance of the agreements on its part hereinbefore set forth.

And the said party of the first part hereby covenants, promises and agrees, to and with the said party of the second part, that the said party of the first part is seized in fee-simple of and is well entitled to grant and convey the lands and premises hereinbefore

granted and conveyed subject only to the deeds of trust or mortgage aforesaid; and that the said party of the second part shall and may as a tenant in common with the said party of the first part peaceably and quietly have, hold and enjoy the same, and that the said party of the first part shall and will at any and all times hereafter, and as often as thereunto requested by the said party of the
107 second part, execute, acknowledge and deliver any and all such further and other deeds and assurances in the law for the conveyance of the equal undivided interest aforesaid in the premises hereinbefore described and for the granting and confirming of the easements and privileges aforesaid, subject to the payment of the purchase-money aforesaid and the interest thereon, as by the said party of the second part, or by its counsel learned in the law, shall be reasonably advised, devised or required.

In witness whereof, the said parties of the first and second parts have caused their respective common and corporate seals to be hereunto affixed and these presents to be signed by their respective presidents and secretaries the day and year first above written.

FRANK H. CLARK,
President of the Lake Superior & Mississippi R. R. Co.

[CORPORATE SEAL.]

S. W. COLTON, JR.,
Ass't Secretary of the Lake Superior & Miss. R. R. Co.

Signed, sealed, and delivered in behalf of the Lake Superior and Mississippi R. R. Company in the presence of—
JAMES SMITH, JR.
J. H. DINGEE, JR.

J. GREGORY SMITH,
Pres't Nor. Pacific Railroad Co.

[CORPORATE SEAL.]

SAM'L WILKESON,
Secretary of the Northern Pacific Railroad Company.

Signed, sealed, and delivered in behalf of the Northern Pacific Railroad Company in the presence of—
JAS. P. SINNOT &
CHARLES NETTLETON.

108 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this 12th day of January, A. D. 1872, before me, the undersigned, Charles Nettleton, a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Minnesota to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared J. Gregory Smith, the president of the Northern Pacific Railroad Company, and Samuel Wilkeson, the secretary of the same company, to me personally known to be such, and, being by me duly sworn, did depose and say that he, the said

J. Gregory Smith, resided in Saint Albans, in the State of Vermont; that he, the said Samuel Wilkeson, resided in Suffolk county, State of New York; that he, the said J. Oregory Smith, was the president of said company; that he, the said Samuel Wilkeson, was the secretary of the same company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company, and that they severally signed their names thereto by the like order as president and secretary of the said company respectively; and the said J. Gregory Smith and Samuel Wilkeson also severally acknowledged that they executed the said instrument as their free and voluntary act and deed and the free and voluntary act and deed of the said Northern Pacific Railroad Company for the uses and purpose- therein mentioned.

In witness whereof I hereunto set my hand and affixed
109 my official seal.

[SEAL.] CHARLES NETTLETON,
Commissioner for Minnesota in New York,
117 *Broadway, N. Y. City.*

STATE OF PENNSYLVANIA, }
City and County of Phila., } *ss:*

Be it remembered that on the seventeenth day of January, A. D. 1872, before me, the undersigned, J. Paul Diver, commissioner resident in the city of Philadelphia, duly commissioned and qualified by the executive authority and under the laws of the State of Minnesota to take acknowledgments of deeds, &c., to be used or recorded therein, personally appeared Frank H. Clark, the president of the Lake Superior and Mississippi Railroad Company, and S. W. Colton, Jr., the assistant secretary of the same company, personally known to me to be such, and, being by me duly sworn, did depose and say that he, the said Frank H. Clark, resided in the city of Saint Paul, State of Minnesota; that he, the said S. W. Colton, Jr., resided in the city of Philadelphia, State of Penna.; that he, the said Frank H. Clark, was the president of said company; that he, the said S. W. Colton, Jr., was the assistant secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument is the corporate seal; that it was so affixed thereto by the order of the board of directors of said company, and that they severally signed their names thereto by the like order as president and assistant secretary of the
110 said company respectively; and the said Frank H. Clark and S. W. Colton, Jr., also severally acknowledged that they executed the said instrument as their free act and voluntary deed and the free and voluntary act and deed of the said Lake Superior and Mississippi Railroad Company for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal as such commissioner.

[SEAL.] J. PAUL DIVER,
Commissioner of Deeds, &c., for the State of Minnesota.

XXVII.

That on said 1st day of January, 1872, the said Lake Superior and Mississippi Railroad Company and the said Northern Pacific Railroad Company entered into a certain agreement in writing, executed by their duly authorized officers, in the words and figures following, to wit:

Lake Superior and Mississippi Railroad Company
with
Northern Pacific Railroad Company.

Agreement for Operating Joint Roads, etc., from Near Thomson to Center of Lake Avenue, Duluth.

JANUARY 1, 1872.

This agreement, made the first day of January, in the year one thousand eight hundred and seventy-two, between the Lake
111 Superior and Mississippi Railroad Company, a corporation existing in the State of Minnesota, party of the first part, and the Northern Pacific Railroad Company, party of the second part.

Witnesseth, that the said party of the first part has sold to the said party of the second part an equal undivided interest in and the right to jointly use and operate that portion of its main line of railroad from and between the junction of the railroads of said several companies near Thomson, in Carlton county, in the State of Minnesota, and a point where the center line of Lake avenue in the city of Duluth in said State crosses the main track of said party of the first part as now located and constructed or as it may be hereafter located and constructed, with certain other rights, property and privileges more particularly described and set forth in a deed of even date herewith delivered to said second party. The said second party hereby agrees to pay said first party for, and on account of said purchase, the sum of five hundred thousand dollars ($500,000.00) in gold coin, to be paid on the first day of January, in the year one thousand eight hundred and ninety-six, if the premises shall at that date *shall* be unincumbered of certain mortgages in said deed mentioned and described, or as soon thereafter as said premises shall be so unincumbered; and while suffered to remain in possession of said premises, and until said principal sum shall become due, to pay semi-annually as interest thereon, on the first days of January and July of each year, the sum of seventeen thousand five hundred dollars ($17,500.00) in gold, to be applied in paying the semi-
112 annual interest upon maturing coupons of the mortgage bonds of said first party so as to pay and satisfy interest coupons upon said bonds to the amount of such semi-annual payments, and of United States taxes thereon the first of said semi-annual payments of seventeen thousand five hundred dollars, to become due and payable on the first day of July, one thousand eight hundred and seventy-two; and further in consideration of the premises

aforesaid, and of the mutual covenants and agreements between said several parties hereinafter set forth, — is further agreed by and between the parties hereto as follows:

First. That in all matters appertaining to the use of said section of railroad and its appurtenances, thus to be used in common as aforesaid by the parties hereto, the said parties, their successors and assigns, shall conform to such rules and regulations as shall from time to time be established by the general superintendents for the time being of the said parties respectively. That a time schedule with a table of rules and regulations for the operating of trains and the management of said section of railroad shall be agreed upon and established by the said superintendents as soon after the date hereof as may be practicable and shall take effect immediately, and that no change except as hereinafter provided shall subsequently be made in the said time schedule, or table of rules and regulations without the consent of both the said superintendents.

Provided, however, that if the said superintendents shall not agree to the rules and regulations to be established and take effect after the first day of January, one thousand eight hundred
113 and seventy-two aforesaid, or if either of the said superintendents shall propose any alteration of the said rules and regulations after the same shall have been adopted or established, and the other superintendent shall not agree thereto, then the superintendent hereinafter specially provided to be appointed for said section shall finally decide all questions in dispute, and the said table of rules and regulations shall be made to conform to the decision of the said special superintendent, and a copy of the said table certified to by the signature of the said special superintendent shall be conclusive evidence of the existence and obligations of the rules and regulations therein contained.

Second. That the management and control of the said section of railroad and its appurtenances, and of the movement of all trains, cars and engines on the said section, shall be entrusted to a superintendent who shall act in common for both parties, whose appointment shall be confirmed by the board of directors of each of the respective parties above named; or they failing to agree, an appointment shall be made by referees as hereinafter provided; and all switchmen, trackmen, signalmen, passenger station keepers, water station keepers and other agents (except trainmen for regular trains) required for the care, maintenance and operation of the said section of road and its appurtenances, shall be appointed by the said superintendent, and shall be under his control absolutely, and all trainmen of either of the respective parties while on this section of railroad on duty on train or otherwise shall be absolutely under the control of the said superintendent of this section of road, who shall have the power to discharge them in case of insubordination,
114 or for the violation of any train order or rule or regulation made to govern the movement of trains on said section; and said employees or trainmen shall have no power to appeal to either general superintendent of the respective parties above named, to be restored to any position on the above-named section; and in case of

the discharge of any trainmen or employee as above mentioned by the said superintendent, it shall be his duty to inform the general superintendent under whom such employee or trainman held his position, of the cause of such discharge in writing, without delay.

And it is further mutually agreed and understood, that — either of the respective parties through their general superintendent, or other duly authorized agent or officer, object at any time to the retention of the superintendent of said section of road, then the general superintendent of each of the respective parties shall (if after a consultation they agree) submit in writing to his board of directors through the president of the same, the reason why such removal is demanded, and each of the respective boards of directors will, within thirty days after receiving such notice in writing, if they fail to agree amicably between themselves, appoint a competent referee and they to choose a third one—the third referee will, within thirty days after their appointment proceed to examine into the complaint, and determine whether the objection is or is not well founded in fact, and otherwise sufficient, and the decision of all or a majority of the referees shall be final and conclusive and forthwith acted upon accordingly by the respective boards of directors. In case the general superintendents of the
115 respective parties cannot agree, or either of the boards of directors fail or neglect to appoint a referee for more than twenty days after having received written notice from the other party of the objections made, and of the name and residence of the referee appointed by the other party, then the referee thus appointed shall choose another, and these two shall choose a third, and the decision of the three, or a majority of them, shall be absolutely binding, final and conclusive as aforesaid. In case the objections are sustained, said referees shall have the power to remedy the grievance complained of, and to order the said superintendent to take such action as may be necessary for that purpose, or to remove the said superintendent and appoint another to fill the position made vacant by the joint action of the respective boards, and they failing to agree, the said appointment shall be made by the said referees as hereinbefore provided for.

Third. That it shall be the duty of the said superintendent to keep the section of railroad and its appurtenances in good order and condition, to employ the proper force of station-keepers, trackmen, switchmen, signalmen, laborers and such other agents or servants as are usually employed on the line of a railroad, and to provide from time to time such additional switches, turn-outs, sidings, passenger stations, water stations and other appurtenances as may be absolutely required to accommodate the business and for the joint use of both parties on said section of road, said party of the second part first putting in twenty-one hundred and thirty (2,130)
116 feet of tracks in sidings, and four (4) frogs and switches at its own expense as that is the amount constructed by the Lake Superior and Mississippi Railroad Company since the first day of January one thousand eight hundred and seventy-one, and all expenses thus incurred, including therein all salaries and wages paid

for the superintendence and maintenance, care, renewal and repairs of the said section of railroad and appurtenances, and including also all and every expense whatever whether hereinbefore specially defined or not, which shall be properly chargeable to the maintenance of way, repairs or renewal on the said section of railroad and its appurtenances shall be equally borne between the said parties, either party to be at liberty to advance the money required to defray such expenses, and the account between them to be adjusted monthly, and settled at least semi-annually, interest at the legal rate to be charged on all advances.

Fourth. That all tax charges and assessments of any and every kind which shall be assessed upon the section of road and appurtenances thus as aforesaid to be used in common by the parties hereto, shall be equally divided between the said parties, but nothing herein contained shall be construed as requiring either party to pay any portion of any tax charge or assessment which may be imposed or levied on the business of the other over the said section of road.

Fifth. That neither party shall be responsible to the other for any loss or damage resulting from any defect in the roadway thus as aforesaid to be used in common, or any switch or other device appurtenant thereto, or for any negligence or misconduct of any agent,
officer or servant, employed at the joint expense of the parties
117 hereto in or about the said section of railroad and its appurtenances. And it is further mutually understood and agreed, that should any accident happen to the trains or property of either party on this section of railroad through the neglect or negligence of the employees of the other party, then the party whose employees have caused such damage shall be responsible to the other party to the full amount of damages sustained by reason of such accident, and shall pay for the same in full.

Sixth. That each of the respective parties shall have the right to run all the regular trains as per its time-card, and all irregular, extra or wild trains over said section of railroad, that they may deem necessary, from time to time, for the accommodation of their business, subject only to the rules and regulations that may be made from time to time by the mutual agreement of both parties to govern and control the movement of trains over said section of railroad, or in default of such agreement by the said sectional superintendent, trains of the same class of each party having the same rights over the said section of railroad, and the superintendent of said section of road shall receive all trains of both parties whether regular or irregular, extra or wild trains and forward them over said section of railroad with all reasonable dispatch, faithfully and impartially, giving and according to all trains of both parties the same and equal rights according to their classification.

Seventh. That no part or portion of the main track of said section
of railroad shall be occupied by either party by standing
118 trains, cars or engines, so as to obstruct or delay the movement of trains, cars or engines of the other party, but that the main track or tracks of the whole of said section shall always be left

open and unobstructed for the free passage of all trains, cars or engines of either party.

Eighth. That in case either party wishes to construct any siding, switch or turnout at any point on the line of said section to be used exclusively by said party, the said party shall have the right to construct the same. Provided, however, they shall bear the full cost of its construction, and in case the other party shall desire to have and enjoy the joint use of said siding, switch or turnout, they shall have the right to do so by first paying one-half the cost of constructing the same.

Ninth. That the docks, wharves, warehouses, depot grounds, and the tracks for the same, and all agents and persons employed therein, the engine-houses shops and shop grounds, and all persons employed therein of each party at Duluth, shall be under the control of and subject to the general superintendents of the respective parties.

Tenth. It is mutually understood and agreed, that the party of the first part shall have the joint use of the track to be constructed across Rice's point and thence eastward along Dock street, in said city and harbor of Duluth, upon notice to the party of the second part of a desire for joint use of said track, and first paying one-half the cost of said track, to the end that the party of the first part may have the free and unobstructed use of its docks, wharves and warehouses to be constructed between Ninth avenue west and
119 Minnesota point, in said city of Duluth, and that said track, when so jointly used by the parties hereto, shall be considered a main track, and shall be kept open and unobstructed for the free passage of the trains, engines and cars of both parties.

Eleventh. That any dispute, difficulty or disagreement between the parties hereto as to the true intent and meaning of this agreement, or any part thereof, or as to anything to be done or omitted by either party hereunder shall (except where it is hereinbefore otherwise provided) be referred to and decided by three disinterested railroad experts, one to be chosen by each of the parties hereto, and the third by the two thus chosen; and the decision of the said referees, or of a majority of them, shall be absolutely binding, final and conclusive upon the parties hereto and each of them, and may be enforced by proper process at law, or in equity, provided however, that if either party hereto shall omit or neglect to appoint a referee for more than twenty days after having received from the other party written notice of the matter in dispute and of the name and residence of the referee appointed by the other party, then the referee thus appointed shall choose another, and these two shall choose a third, and the decision of the three, or a majority of them, shall be absolutely binding, final and conclusive as aforesaid.

That all local freights and passenger fares from Duluth to the junction near Thomson aforesaid, or points between Duluth and said junction, and all such local freights and fares from said junction to Duluth and intermediate points, shall be carried or
120 transported as an uniform rate by said several parties, such rates to be fixed from time to time by the superintendents of

said companies, and that in case the amount received for such fares and freights by either of said companies shall exceed that received by the other, then the company receiving such excess shall pay to the other party forty (40) per cent. of the amount of such excess, the residue of such excess, to wit: sixty per cent. thereof is to be retained by such company or corporation for handling and transportation.

Monthly statements of such earnings for local freights, &c., above specially provided for, shall be made by the superintendent of said section of road; duplicate copies of which shall be delivered to each of the parties hereto, and the amount upon the basis aforesaid paid to the company entitled thereto.

In witness whereof, the said parties of the first and second parts have caused their respective common and corporate seals to be hereunto affixed and these presents to be signed by their respective presidents and secretaries the day and year first above written.

FRANK H. CLARK,
President of the Lake Superior & Mississippi Railroad Co.
[CORPORATE SEAL]. S. W. COLTON, JR.,
Ass't Secretary of the Lake Sup. & Miss. R. Co.

Signed, sealed, and delivered in behalf of the Lake Superior & Miss. R. R. Co.
JAMES SMITH, JR.
J. H. DINGEE, JR.

J. GREGORY SMITH,
Pres't Nor. Pacific Railroad Co.
121 [CORPORATE SEAL.] SAM'L WILKESON,
Secretary of the Northern Pacific Railroad Company.

Signed, sealed, and delivered in behalf of the Northern Pacific Railroad Company in the presence of—
JAS. P. SINNOTT.
CHARLES NETTLETON.

STATE OF NEW YORK, } *ss:*
City and County of New York, }

Be it remembered that on this 12th day of January, A. D. 1872, before me, the undersigned, Charles Nettleton, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Minnesota to take the acknowledgment of deeds, &c., to be used or recorded therein, personally appeared J. Gregory Smith, the president of the Northern Pacific Railroad Company, and Samuel Wilkeson, the secretary of the same company, to me personally known to be such, and, being by me duly sworn, did depose and say that he, the said J. Gregory Smith, resided at St. Albans, in the State of Vermont; that he, the said Samuel Wilkeson, resided in Suffolk county, in the State of New York; that he, the said J. Gregory Smith, was the president of the said company; that he, the said Samuel Wilkeson,

was the secretary of the same company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such seal; that it was so affixed thereto by
122 order of the board of directors of said company, and that they severally signed their names thereto by the like order as president and secretary of the said company respectively; and the said J. Gregory Smith and Samuel Wilkeson also severally acknowledged that they executed the said instrument as their free and voluntary act and deed and as the free and voluntary act and deed of the said The Northern Pacific Railroad Company for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal.

CHARLES NETTLETON,
[SEAL.] *Commissioner for Minnesota in New York,*
117 *Broadway, New York City.*

STATE OF PENNSYLVANIA, } ss:
City & County of Philada., }

Be it remembered that on the seventeenth day of January, A. D. 1872, before me, the undersigned, J. Paul Diver, commissioner resident in the city of Philadelphia, duly commissioned and qualified by the executive authority and under the laws of the State of Minnesota to take acknowledgment of deeds, &c., to be used or recorded therein, personally appeared Frank H. Clark, the president of the Lake Superior and Mississippi Railroad Company, and S. W. Colton, Jr., the assistant secretary of the same company, personally known to me to be such, and, being by me duly sworn, did depose and say that he, the said Frank H. Clark, resided in the city of St. Paul, State of Minnesota; that he, the said S. W. Colton, Jr., resided in the city of Philadelphia, State of Pennsylvania; that he, the said Frank H.
123 Clark, was the president of said company; that he, the said S. W. Colton, Jr., was assistant secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is the corporate seal; that it was affixed thereto by the order of the board of directors of said company, and that they severally signed their names thereto by the like order as president and assistant secretary of the said company respectively, and the said Frank H. Clark and S. W. Colton, Jr., also severally acknowledged that they executed the said instrument as their free and voluntary act and deed and as the free and voluntary act and deed of the Lake Superior and Mississippi Railroad Company for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal as such commissioner.

J. PAUL DIVER,
Commissioner of Deeds, &c., for the State of Minnesota.

XXVIII.

That thereafter and on the 1st day of May, A. D. 1872, the said Lake Superior and Mississippi Railroad Company and the said Northern Pacific Railroad Company entered into a further agreement in writing, executed by their duly authorized officers, and said last-mentioned agreement is in the words and figures following, to wit:

124 Lake Superior and Mississippi Railroad Company
to
Northern Pacific Railroad Company.

Lease of Road.

Dated MAY 1ST, 1872.

This indenture, made the first day of May, in the year of our Lord, one thousand eight hundred and seventy-two between the Lake Superior and Mississippi Railroad Company, of the first part, and the Northern Pacific Railroad Company of the second part.

Whereas the said Lake Superior and Mississippi Railroad Company, the party hereto of the first part, is a railroad corporation, duly created and organized under certain acts of the legislature of the former Territory of Minnesota and existing and carrying on business as such corporation under the constitution and laws of the State of Minnesota.

And whereas the said party of the second part is a corporation created and organized under an act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast by the northern route," approved July 2, 1864, and existing as such corporation under said act and under certain congressional resolutions amendatory thereof, as well as under certain legislative acts of the States of Minnesota and Wisconsin respectively.

125 And whereas the said party of the first part is in possession of and duly authorized to operate a certain railroad, commonly known as the Lake Superior and Mississippi railroad, which extends from the city of Saint Paul in the county of Ramsey, and the State of Minnesota, to the waters of Lake Superior, in the city of Duluth, in the county of Saint Louis, and the same State, being a distance of one hundred and fifty-six (156) miles, more or less.

And whereas the said party of the first part is the sole owner of said railroad, and of the depots, depot grounds, lands and premises connected therewith, except as to a portion thereof, lying between the point of connection thereof, with the Northern Pacific railroad hereinafter described, and the center line of Lake avenue, in said city of Duluth, being a distance of twenty-six miles, more or less, in respect to which twenty-six miles, the said party of the first part has heretofore executed and delivered to the said party of the second part, a deed upon condition, conveying to the said party of the second part, an equal undivided interest in such twenty-six miles, or there-

abouts of said railroad conditioned upon the payment of the purchase-money thereof, and of the interest thereon, at the times, and in the manner mentioned and set forth in the said deed, which bears date on the first day of January 1872 and to which reference is for greater certainty hereby made.

And whereas the said railroad now being constructed by the said party of the second part, and which is known as the Northern Pacific railroad, connects at or near the town of Thomson, in Carlton
126 county, in the said State of Minnesota, with the Lake Superior and Mississippi railroad aforesaid, and it is believed by the parties hereto, to be for their mutual interest that the said Northern Pacific railroad and the said Lake Superior and Mississippi railroad should be operated under one and the same management and control.

And whereas the said party of the first part, heretofore, to wit, on or about the first day of January in the year of our Lord one thousand eight hundred and sixty-nine, duly executed and delivered to J. Edgar Thomson and William G. Moorehead, both of the city of Philadelphia, in the State of Pennsylvania, a deed of trust or mortgage, bearing date on that day, whereby the said party of the first part granted and conveyed the said Lake Superior and Mississippi railroad, and all the rights and franchises, connected and to be connected therewith, and all the rights, title and interest of the said party of the first part in and to the lands granted by the Congress of the United States to aid in the construction thereof, and all property whatsoever, both present and future of the said party of the first part, to the said J. Edgar Thomson and William G. Moorehead in trust to secure the payment of a certain issue of bonds of the said party of the first part, amounting in the aggregate to four millions and five hundred thousand dollars, and which are designated the first-mortgage sinking-fund land-grant bonds of the said party of the first part, and are payable on the first day of January, A. D. 1896, in gold coin of the United States of America, and bear interest at the rate of seven per cent per annum, payable semi-annually, namely on the first days of January and July in
127 each year in the like gold coin, free of United States taxation, until the principal sum is paid as by reference to the said deed of trust or mortgage, which has been duly recorded, will more fully and at large appear.

And whereas afterwards, to wit, on or about the first day of April in the year of our Lord one thousand eight hundred and seventy the said party of the first part, duly executed and delivered to the said trustees a certain other deed of trust or mortgage bearing date on said last-mentioned day whereby the said party of the first part again granted and conveyed the said Lake Superior and Mississippi railroad and all the rights and franchises connected and to be connected therewith, and all right, title and interest of the said party of the first part in and to the lands granted by the Congress of the United States to aid in the construction thereof to the said trustees subject, however, to the deed of trust or mortgage aforesaid, except as to certain lands within the city of Duluth, which had been

acquired subsequently to the execution and delivery of said first deed of trust or mortgage to secure the payment of a certain other issue of bonds of the said party of the first part amounting in the aggregate to the sum of three millions two hundred thousand dollars, and which are designated the second-mortgage land-grant bonds of the said party of the first part and are payable on the first day of October A. D. 1900 and bear interest payable semi-annually, and the principal and interest whereof are both payable in gold coin of the United States of America free from taxation either by the United States or by the State of Minnesota as by reference to the said second deed of trust or mortgage which has been
128 duly recorded will more fully and at large appear.

And whereas on or about the first day of November in the year of our Lord one thousand eight hundred and seventy, the Stillwater and Saint Paul Railroad Company, a certain railroad corporation existing in the State of Minnesota, duly executed and delivered to the said party of the first part hereto a certain indenture of lease or agreement, bearing date on that day whereby the said Stillwater and Saint Paul Railroad Company covenanted and agreed to lease and did demise, lease and let unto the said party of the first part, for the term of nine hundred and ninety-nine years from the first day of January one thousand eight hundred and seventy-one, a certain line of railroad then in process of construction belonging to the said Stillwater and Saint Paul Railroad Company and extending from Stillwater in the county of Washington to a point on the said Lake Superior and Mississippi railroad at or near White Bear Lake in the county of Ramsey, and the same State.

And whereas, the said Stillwater and Saint Paul Railroad Company had heretofore provided for the issue of certain bonds amounting in the aggregate to four hundred thousand dollars in gold, and bearing interest at the rate of seven per centum per annum payable in gold coin of the United States of America, free from such taxes as the said company might be required to deduct therefrom under the laws of the United States, or of the State of Minnesota: And whereas, in order to secure the payment of the principal and interest of said bonds, the said company had by a deed of trust or mortgage bearing date of the said first day of November one thousand
129 eight hundred and seventy, granted and conveyed the said railroad which it was authorized to construct, and also the lands granted by the Congress of the United States to aid in the construction thereof, unto Samuel M. Felton, and William G. Moorehead, as trustees and the said premises are subject to the lien of the said mortgage.

And whereas, the said indenture of lease or agreement, reserved as the annual rent thereunder, a sum equal to seven per centum per annum, on a principal of four hundred thousand dollars payable in gold, together with the amount of taxes, which the said company by omitting to deduct the same from the interest of said bonds, should become liable to pay.

And whereas, on or about the fifth day of June in the year of our Lord one thousand eight hundred and seventy-one, the Minneapolis

and Duluth Railroad Company, a certain railroad corporation existing in the State of Minnesota, duly executed and delivered to the said party of the first part hereto, a certain indenture of lease or agreement bearing date on that day whereby the said Minneapolis and Duluth Railroad Company covenanted and agreed to lease and did demise, lease and let, unto the said party of the first part, for the term of nine hundred and ninety-nine years from the first day of September one thousand eight hundred and seventy-one, a certain line of railroad then in process of construction belonging to the said Minneapolis and Duluth Railroad Company and extending from a point at or near the junction depot of the First division of the Saint Paul and Pacific Railroad Company in Saint Anthony in a northeasterly direction to a point of junction with the said Lake
130 Superior and Mississippi railroad, at or near White Bear Lake in the county of Ramsey and same State.

And whereas the said Minneapolis and Duluth Railroad Company had theretofore provided for the issue of certain bonds, amounting in the aggregate to four hundred thousand dollars in gold, and bearing interest at the rate of seven per centum per annum, payable in gold coin of the United States of America, free from such taxes as the said company might be required to deduct therefrom under the laws of the United States or of the State of Minnesota.

And whereas in order to secure the payment of the principal and interest of said bonds, the said company had by a deed of trust or mortgage dated on the twentieth day of May in the year of our Lord one thousand eight hundred and seventy-one granted and conveyed the said railroad, which it was authorized to construct unto the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia, Pennsylvania, as trustee, and the said premises are subject to the lien of said mortgage.

And whereas the said indenture of lease or agreement reserved as the annual rent thereunder, a sum equal to seven per centum per annum, on a principal of four hundred thousand dollars, payable in gold together with the amount of taxes which the said company, by omitting to deduct the same from the interest on said bonds, should become liable to pay.

And whereas on or about the twenty-fourth day of Octo- in the year of our Lord, one thousand eight hundred and seventy-one, the Minneapolis and Saint Louis Railway Company, a certain
131 railroad corporation existing in the State of Minnesota, duly executed and delivered to the said party of the first part hereto a certain indenture of lease or agreement, bearing date on that day, whereby the said Minneapolis and Saint Louis Railway Company covenanted and agreed to lease, and did demise, lease and let unto the said party of the first part, for the term of nine hundred and ninety-nine years from the first day of November in the year of our Lord one thousand eight hundred and seventy-one a certain line of railroad then in process of construction, belonging to the said Minneapolis and Saint Louis Railway Company and extending from a point within the city of Minneapolis to a point on the Saint Paul and Sioux City railroad, in the county of Scott in the same State.

And whereas the said Minneapolis and Saint Louis Railway Company had theretofore provided for the issue of certain bonds amounting in the aggregate to seven hundred thousand dollars in gold, and bearing interest at the rate of seven per centum, payable in gold coin of the United States of America, free from such taxes as the said company might be required to deduct therefrom under the laws of the United States or of the State of Minnesota. And whereas in order to secure the payment of the principal and interest of the said bonds, the said company had, by a deed of trust or mortgage, bearing date the first day of July, one thousand eight hundred and seventy-one granted and conveyed the said railroad, which it was
authorized to construct, unto the Fidelity Insurance Trust
132 and Safe Deposit Company of Philadelphia, Pennsylvania,
as trustee, and the said premises are subject to the lien of said mortgage. And whereas the said indenture of lease or agreement reserved as the annual rent thereunder a sum equal to seven per centum per annum, on a principal of seven hundred thousand dollars, payable in gold, together with the amount of taxes which the said company, by omitting to deduct the same from the interest on said bonds, should become liable to pay.

Now therefore this indenture witnesseth that for and in consideration of the premises, and of the rents, covenants and agreements hereinafter mentioned, reserved and contained on the part and behalf of the said party of the second part, to be paid, kept and performed, the said party of the first part to these presents has granted, demised and leased and by these presents does grant, demise and lease unto the said party of the second part, its successors and assigns, all and singular that certain railroad situate, lying and being in the State of Minnesota, and which is known as the Lake Superior and Mississippi railroad, and which extends from the terminous thereof, within the city of Saint Paul, in the county of Ramsey, to the waters of Lake Superior in the city of Duluth, and the county of Saint Louis, being a distance of one hundred and fifty-six miles, more or less, together with the lands and premises occupied by and connected therewith and together with the rolling stock, equipments and appurtenances of the said railroad, belonging to the said party of the first part, and all rights, privileges and
franchises of the said party of the first part, necessary to the
133 operation and management of the said railroad or the business thereof, including in the premises hereby demised, all the railways, ways and rights of way, and all the depot grounds, and all the tracks, bridges, viaducts, culverts, fences and other structures and all the depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings and all the machine shops and other shops and all lands and premises whatsoever, belonging to the said party of the first part and which have been heretofore used or acquired for use in connection with the said Lake Superior and Mississippi railroad or the business thereof; but excluding and excepting, however, from the lands and premises hereby demised, all lands granted by the Congress of the United States, or by the State of Minnesota, to aid in the construc-

tion of the said railroad, or otherwise acquired, which do not constitute any part of the road-bed of said railroad or of the lands reserved or intended for such road-bed or any part of the lands used for depot or station purposes, and which have not been heretofore used or acquired for use in connection with said demised railroad or the business thereof, and upon which none of the buildings or structures hereinbefore mentioned are erected, built or located; and excepting also, certain lots, pieces and parcels of land in the said city of Duluth, beyond the terminus of said railroad as now constructed, which lots, pieces and parcels of land are situate northeasterly of the breakwater, as now constructed in the harbor of said city, and lie between said breakwater and Chester creek, and are, taken together, bounded on
134 one side by Superior street and on the other side by the waters of Lake Superior, and were heretofore acquired by the said party of the first part otherwise than by said Congressional and legislative grants. Provided, however, that the party of the second part, at any time within ten years after the date of this lease, shall have the right and privilege of occupying for the term of said lease not more than one hundred feet in width of said lands last reserved from this lease for any distance upon the same in a northeasterly direction between the breakwater and Chester creek, as a road-bed for any railroad tracks and as a site for any structures for railroad purposes which the said party of the second part shall deem desirable for the uses and business of the said demised railroad, and also the right to occupy for wharves or any purposes connected with said business not more than five hundred lineal feet in width of the said land along the shore of the said lake.

And this indenture further witnesseth that, for the consideration aforesaid, the said party of the first part has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over unto the said party of the second part, its successors and assigns all the right, title and interest of the said party of the first part in and to the lease and agreement bearing date on the first day of November one thousand eight hundred and seventy- made by the Stillwater and Saint Paul Railroad Company to the said party of the first parf hereinbefore recited, and all the right, title and interest of the said party of the first part in, to and
135 concerning the railroad and premises in the said lease or agreement mentioned and described; and also, all the right, title and interest of the said party of the first part, in and to the lease or agreement, bearing date on the fifth day of June, A. D. one thousand eight hundred and seventy-one, made by the Minneapolis and Duluth Railroad Company, to the said party of the first part as hereinbefore recited, and all the right, title and interest of the said party of the first part in, to and concerning the railroad and premises in the said lease or agreement so made by the said Minneapolis and Duluth Railroad Company mentioned and described; and also all the right, title and interest of the said party of the first part in and to the lease or agreement bearing date on the fourth

day of October, A. D. one thousand eight hundred and seventy-one, made by the Minneapolis and Saint Louis Railway Company, to the said party of the first part as hereinbefore recited, and all the right, title and interest of the said party of the first part in, to and concerning the railroad and premises in the said lease or agreement so made by the said Minneapolis and Saint Louis Railway Company mentioned and described.

To have and to hold the said Lake Superior and Mississippi railroad, and the lands and premises connected therewith and hereinbefore demised, unto the said party of the second part, its successors and assigns, for, during and until the full end and term of nine hundred and ninety nine years, next ensuing the date hereof, the said party of the second part, its successors and assigns,
136 yielding and paying therefor unto the said party of the first part, its successors and assigns, yearly and every year the yearly rent hereinafter specified, and keeping and performing the covenants and agreements hereinafter set forth, to be by the said party of the second part kept and performed; but subject nevertheless to the lien of the deed of trust or mortgage aforesaid made by the said party of the first part to J. Edgar Thomson and William G. Moorehead to secure certain bonds to the amount of four millions five hundred thousand dollars hereinbefore recited as being the first-mortgage sinking-fund land-grant bonds of the said party of the first part.

And to have and to hold also the said several indentures of lease or agreement hereinbefore assigned, and the railroads and premises therein respectively mentioned and described, unto the said party of the second part, its successors and assigns, for and during the respective unexpired terms of said leases or agreements but subject to the deeds of trust or mortgage in said leases or agreements respectively mentioned, and to which the said leases or agreements are respectively subject.

And this indenture further witnesseth that the said Lake Superior and Mississippi railroad is granted and demised, and the said several indentures of lease are assigned and set over unto the said party of the second part, upon the terms, conditions and agreements hereinafter mentioned, and set forth; and that the said parties to these presents have promised and agreed and by these presents do covenant, promise and agree to and with each other in
137 the manner and — following, to wit:

Article first. The second mortgage or deed of trust executed by the party of the first part to J. Edgar Thomson and William G. Moorehead of Philadelphia to secure bonds amounting to three millions two hundred thousand dollars, being at the date hereof a lien upon the railroad and premises hereinbefore demised, the said party of the first part hereby covenants, promises and agrees that it shall and will within a reasonable time from the date hereof, procure and cause the bonds and coupons secured to be paid by said second mortgage to be surrendered and cancelled and the said second mortgage to be satisfied of record, so that the said party of the second part, may and shall hold and possess the said de-

mised Lake Superior and Mississippi railroad and the premises connected therewith, and not excepted or reserved from this lease, subject only to the first mortgage or deed of trust made to the said J. Edgar Thomson and William G. Moorehead to secure the payment of the bonds hereinbefore designated as the first-mortgage sinking-fund land-grant bonds of the said party of the first part.

And the said party of the first part further promises, agrees and guarantees that it shall and will at all times hereafter indemnify and save harmless the said party of the second part from and against said second mortgage, and the bonds thereby secured to be paid, and from and against any and all claims and demands, and any and all loss and damage whatsoever arising out of or resulting from the said second mortgage, or the bonds thereby secured to be paid.

138 Provided always, and it is hereby agreed, that the said party of the first part, in order to procure such surrender of said second-mortgage bonds, may issue an equal amount of income bonds, in exchange for said second-mortgage bonds, which income bonds may be secured by mortgage on said demised premises and on the lands granted by Congress, as aforesaid, to aid in the construction of said railroad, but subject always to this indenture and the provisions thereof.

Article second. It is hereby covenanted, promised and agreed by and between the parties to these presents that for the purpose of computing and determining the amount of money payable in each year by the said party of the second part, as and for the rent of the railroads and premises aforesaid, the said Lake Superior and Mississippi railroad, the said Stillwater and Saint Paul railroad, the said Minneapolis and Duluth railroad and the said Minneapolis and Saint Louis railway shall be deemed and taken to be and constitute, but one line of railroad, provided however, that in computing the rental to be paid under this indenture the earnings for transportation over the portion of said railroad lying between the junction of the railroads of the parties hereto, at or near Thomson aforesaid, and the center line of Lake avenue in the city of Duluth of freight or passengers passing over the same from the Northern Pacific railroad, or passing over the same to the said Northern Pacific railroad and destined to go to or by way of any point on said Northern Pacific railroad, and the amount thereof shall be deducted from the gross sum upon which the rental herein reserved shall

139 be computed; and provided further that one-half of the earnings arising from all business strictly local to the said twenty-four miles of road, namely all traffic arising and completed thereon shall also be deducted from such gross sum, and that the balance only including the earnings of said leased lines shall be deemed to be the gross earnings of the said demised railroad upon which the rental hereby reserved shall be computed; provided however and this agreement is upon the condition that in addition to paying the percentage upon said gross earnings hereinafter mentioned as the rental hereby reserved, the said party of the second part shall also well and truly pay in each and every year the sum

of thirty-five thousand dollars in gold as provided in the deed upon condition bearing date January 1, 1872, hereinbefore mentioned until the principal sum of five hundred thousand dollars mentioned in said deed shall be paid, when such additional payment of thirty-five thousand dollars per annum shall cease, and from thenceforth the rental shall be limited to the percentage of gross earnings computed as aforesaid hereinafter specified.

And the said party of the second part covenants, promises and agrees that the said several lines of railroad being so, treated as forming but one line of railroad, subject to the provisos hereinafter set forth, the said party of the second part shall and will in each and every year of the term hereinbefore granted well and truly use, apply and pay or cause to be paid, in the manner and to the parties respectively hereinafter mentioned, not less than thirty per centum of the total aggregate gross earnings of the said railroads, that is to say, the said party of the second part will pay out of said
140 gross earnings to the Stillwater and Saint Paul Railroad Company aforesaid in equal semi-annual installments the sum of twenty-eight thousand dollars per annum, at the agency of the said company in the city of New York, on the first days of June and December in gold coin of the United States of America, and in addition thereto shall pay to the treasurer of the party of the first part such taxes as the said company may be liable to pay under the provisions of the first-mortgage bonds, issued by it as hereinbefore recited, and one thousand dollars in United States currency, the latter sum being the amount provided in said lease to be paid to maintain the corporate organization of said company, and the said party of the second part shall pay to the Minneapolis and Duluth Railroad Company aforesaid, in equal semi-annual installments at the agency of the said company in the city of New York, on the first days of May and November, the like sum of twenty-eight thousand dollars per annum in gold coin of the United States of America, and in addition thereto shall pay to the treasurer of the party of the first part, such taxes as the said Minneapolis and Duluth Railroad Company may be liable to pay under the provisions of the first-mortgage bonds issued by it as hereinbefore recited; and the said party of the second part shall also pay to the Minneapolis and Saint Louis Railway Company aforesaid, equal semi-annual installments at the agency of the said company, in the city of New York, on the first days of January and July, the further sum of forty-nine thousand dollars per annum in gold coin of the United States of America, and also to the treasurer of the party of the first-
141 part hereto, all such taxes as the said company may be liable to pay under the provisions of the first-mortgage bonds; provided however that nothing herein contained shall be held to require or authorize the payment of rental under said leases respectively, except in the manner and to the extent that the said party of the first part to these presents has agreed to pay the same and provided further, that the said party of the first part shall pay the yearly sums required by the leases of the said Minneapolis and

Duluth and the said Minneapolis and Saint Louis railroads as sinking funds.

And the said party of the second part will pay, in each and every year of the said term, to the said party of the first part, its successors and assigns such surplus of the said thirty per centum of the total gross earnings as shall or may remain after paying or providing for the payment of such rents under said assigned leases, as and for the rent hereby reserved as payable on account of the said Lake Superior and Mississippi railroad, during said term provided always, that the said party of the second part shall have the right to apply any and all moneys becoming due, or as or for such rent, in and to the payment, so far as necessary or sufficient, of the semi-annual interest on said first-mortgage, sinking-fund land-grant bonds and such taxes as the said party of the first part may be liable to pay thereon, and that the delivery to the said party of the first part by the said party of the second part of the coupons representing interest so paid, shall in all cases be equivalent to the direct payment of the sums thereby represented.

142 But in case the party of the first part shall notify the party of the second part in writing, at least thirty days before any semi-annual interests on its said bonds shall become due and payable, that due provision has been made for the payment of the same by the sales of lands of the party of the first part or otherwise, and shall furnish to the party of the second part satisfactory evidence of that fact, then and in that case, the said party of the second part shall not apply such portion of said rent to the payment of the interest for the payment of which provision shall have been made by the said party of the first part, but shall pay such rent to the said party of the first part directly, on the day when such interest shall fall due, after deducting therefrom such amount as the said party of the first part may then be indebted to the said party of the second part for or on account of advance theretofore made on its behalf pursuant to this lease.

And the said party of the second part further promises and agrees that in case during any six months of the period of five years next following the date hereof, the proportion of thirty per centum of the gross earnings of the said railroads shall not be equal to the aggregate of six months' interest on the said first-mortgage bonds of the said party of the first part including such taxes as may be payable on said interest, and six months' rent under the leases hereinbefore assigned the said party of the second part shall, if necessary, and may take up and hold uncancelled, and in full force, validity and effect an amount of coupons representing interest on

143 said first-mortgage bonds, equal to such deficiency which coupons the said party of the first part hereby promises and agrees shall be paid and discharged with interest at and after the rate of seven and three-tenths (7.3) per centum per annum, payable in gold coin of the United States of America, out of the first sales of lands, which shall thereafter be made by or on account of the said party of the first part, and the proceeds of such sales shall in all cases be devoted to the payment thereof so far as necessary.

And the said party of the second part further promises and agrees, that in case in any year the gross earnings of the said entire line of railroad shall exceed the sum of one million four hundred thousand dollars in gold coin of the United States of America or the equivalent thereof in lawful money of the United States, according to the price of gold at the dates when the rental aforesaid shall be payable so that thirty per centum thereof will pay and discharge the rentals reserved under said assigned leases, and in addition thereto, the interest on said first-mortgage bonds of the said party of the first part as aforesaid and leave a surplus then and for such year, the amount payable as rental in respect to the said line of railroad, shall be as follows: First, thirty per centum on one million four hundred thousand dollars in gold and next fifty per centum in currency upon each one hundred thousand dollars in currency of the excess of said total gross earnings over and above the said sum of one million four hundred thousand dollars in gold; provided however that the total rent to be paid by the said party of the
144 second part for or in respect to any one year of the term hereby demised, including the rents of the lines leased by the said party of the first part as aforesaid, shall never exceed an amount equal to four hundred and twenty thousand dollars in gold, and three hundred and twenty-one thousand dollars in currency and all taxes payable by the parties of the first part, the said sum of three hundred and twenty-one thousand dollars being equivalent to ten per centum on the income bonds hereinbefore mentioned, to be issued in exchange for second-mortgage bonds, and to be paid directly to the parties of the first part, in whole or in part as earned, on the first days of April and October, and the sum of one thousand dollars, necessary to be paid, to maintain the organization of the Stillwater and Saint Paul Railroad Company under the lease hereinbefore recited; and provided further, that nothing in these presents contained shall require the said party of the second part to pay the fifty per cent. aforesaid on any fractional part of any one hundred thousand dollars increase in annual gross earnings over the said sum of one million four hundred thousand dollars in gold.

Article third. The said party of the second part promises and agrees that it shall and will at its own proper cost and expense and without deduction from the rent aforesaid, operate and run the said demised railroads at all times during the said term in the same manner as the said party of the first part, as the owner thereof or otherwise, is now or shall or may at any time hereafter be required by law to do; and the said party of the second part shall
145 and will, at its proper cost and expense and without deduction from the rent aforesaid, at all times during the said term maintain, preserve and keep the said railroad and premises and every part of the same in good working order and condition, and supplied with rolling stock and equipment, adequate to its business. And the said party of the second part further promises and agrees that it shall and will at its own proper cost and expense, and without deduction from the rent aforesaid from time to time,

and whenever needed, during the term aforesaid do or cause to be done to and upon the said demised railroad and premises any and all repairs replacements and renewals which may be reasonably required for the purposes aforesaid, and provide thereon such rolling stock and equipment, and other facilities, as shall or may be reasonably required for the purposes aforesaid; and that the said party of the second part shall and will use all reasonable efforts to maintain, develope and increase all the business of said railroad.

And the said party of the second part further promises and agrees that it shall and will at all times during the term aforesaid, hold, save and keep harmless and indemnified the said party of the first part, of, from and against any and all expenses of operating the railroad and premises hereby demised, and all damages, liabilities, actions and causes of action, suits, claims and demands for injuries to persons or property, or for causing the death of any person, or thing through accident neglect or default during said term, or for breach of contract, or wrong done or suffered by
146 reasons of the said party of the second part refusing to transport, or its negligence in transporting any person, property or thing, or by the loss, conversion or non-delivery of any property which the said party of the second part shall have agreed or undertaken or be bound to transport over the said railroad, or which the said party of the first part as the owner of the said railroad hereby demised is or shall be under any legal obligation by public duty to transport thereon; and of, from and against any and all costs, damages, liabilities, actions and causes of action, suits, claims, and demands whatsoever, which shall or may arise out of, or in respect to the management, operation or business of the said demised railroad and premises during the term aforesaid, and the said party of the second part shall and will defend all suits and claims which shall or may be brought against the party of the first part during the said term, in respect to any matter or thing arising out of the operation or management of the said demised railroads while the same shall be in the possession of the said party of the second part under these presents.

And the said party of the first part on its part hereby covenants, promises and agrees that it shall and will at all times hereafter indemnify and save harmless the said party of the second part to these presents of, from and against any and all costs, charges, expenses, liabilities, claims and demands whatsoever which can or may arise to or be brought against or incurred by the said party of the second part, for, on account, or in respect to the organi-
147 zation, construction, management or operation heretofore of the said Lake Superior and Mississippi railroad or the other railroads of which leases are hereinbefore assigned, or for or on account of any rent heretofore accrued on said assigned leases or either of them; and that the said party of the second part, paying the yearly rental aforesaid, and keeping and performing the covenants and agreements mentioned and set forth in these presents, to be by it kept and performed, shall and may peaceably and quietly have hold, possess and enjoy the said Lake Superior and Mississippi

railroad, and the demised premises connected therewith, for the term hereinbefore granted, and also the railroads and premises of which leases are hereinbefore assigned, for the terms granted by the said leases respectively; and further that the said party of the first part has good right and lawful authority to grant and demise the said Lake Superior and Mississippi railroad as aforesaid, and to sell, assign and set over the said hereinbefore assigned leases in the manner and form in which the said party of the first part *have* hereinbefore sold, assigned and set over the same unto the said party of the second part.

Article fourth. The said party of the first part hereby promises and agrees to pay and discharge in each and every year of the said term, any and all taxes which may become payable upon or in respect to the gross earnings or receipts of said demised railroads or any of them, unless said gross earnings for such year shall exceed the sum necessary to produce at the percentage, and upon the terms hereinbefore set forth, the maximum rental hereinbe-
148 fore reserved; and in case the total amount of said gross earnings shall in any year exceed the sum necessary to produce such maximum rental, then the said party of the first part shall for and in respect to that year, pay the tax or taxes upon so much of said gross earnings as are necessary to produce at the percentage, and upon the basis aforesaid the said maximum rental; and the said party of the second part shall pay the tax or taxes upon the surplus of said gross earnings over and above the amount thereof so producing such maximum rental, provided always, that the tax or taxes so to be paid by the said party of the second part shall be a just proportion of the whole tax payable on such gross earnings, computing the same upon the whole sum thereof; and provided further that nothing herein contained shall require the said party of the second part to pay in or for any year a larger sum than under the existing legislation of the State of Minnesota would be payable upon or in respect to such surplus of gross earnings it being hereby agreed that an increase in the rate of taxation shall be borne by the said party of the first part.

And the said party of the first part hereby agrees to pay and discharge any and all other taxes, assessments, imposts and charges which shall or may during the said term be levied, assessed or imposed upon the said railroads and premises or upon any part or portion thereof.

And provided further that in case the said party of the first part shall in any year fail or omit to pay the taxes which the said party of the first part has hereinbefore agreed to pay, the said party
149 of the second part may at its own option and not otherwise pay and discharge the same for account of the said party of the first part and charge the amount so paid on account of and against the rental hereinbefore reserved; and the said party of the first part hereby agrees to repay to the said party of the second part any and all sums which the said party of the second part shall so advance to pay taxes, with interest thereon; at the rate of seven and three tenths (7.3) per centum per annum.

Article fifth. The said parties hereto further promise and agree, that in case any of the first-mortgage bonds aforesaid, of the said party of the first part shall remain outstanding and unredeemed by the operation of the sinking fund provided in said mortgage for the redemption thereof, when the time mentioned in said bonds for the payment of the same shall have arrived, then the said party of the first part shall be entitled, as it may deem most expedient and find most practicable to pay and discharge said outstanding bonds, or to issue and substitute therefor new bonds to not exceeding the same aggregate amount and bearing not exceeding the same rate of interest; and to that end the said party of the first part may execute upon the right, title and interest which it shall then have in the said Lake Superior and Mississippi railroad; and so much of the lands and premises included in the existing first mortgage, as may then remain subject to the lien thereof a new mortgage to secure the payment of said new first-mortgage bonds which new mortgage shall be and become a lien on the premises mentioned and described therein prior to the lien of these presents, notwithstanding
150 the priority in time of execution and record of these presents; provided always, that for each and every new bond so issued an outstanding bond for an equal amount shall be cancelled or the said party of the first part may procure the time of payment of the principal of said outstanding bonds to be extended by agreement endorsed thereon or otherwise, provided only that the amount of bonds secured by a lien prior to the lien of these presents, shall not thereby be increased beyond the then existing amount, nor shall any higher or greater rate of interest be agreed to be paid thereon.

Article sixth. The said party of the second part promises and agrees, that it shall and will while in possession of said railroads, under these presents at all times keep full, true and accurate accounts of the business done upon the said railroads, and that such accounts shall at all reasonable hours and times be open to the inspection and examination of the president, treasurer or secretary of the said party of the first part, or of any person appointed to examine the same by the board of directors of the said party of the first part which right of inspection shall include the right to take copies of said accounts; and that the said party of the second part shall and will semi-annually, to wit, on or before the fifteenth days of February and August in each year make up and furnish to the said party of the first part a detailed statement of the earnings and business of said railroads, showing the gross earnings, and the operating expenses, including the cost of repair and replace-
151 ments during the six months ending with the thirty-first day of December and the thirtieth day of June respectively preceding the time of rendering such statement.

Article seventh. The party of the first part hereby agrees, that for the purpose of enabling the party of the second part to meet the obligations of the party of the first part to the public by making from time to time such improvements upon and additions to the said Lake Superior and Mississippi railroad, in the extension of facilities for increased business by additional tracks and depots,

shops and equipments, and the substitution of stone or iron buildings for wooden buildings or steel rails for iron rails, the party of the first part will issue, from time to time, to the said party of the second part a special stock which shall bear such name as shall be hereafter agreed upon, or bonds or other securities which shall be issued in such form as may from time to time, be found to be most available with respect to economy of interest and negotiability, and as shall be consistent with the legal powers of the party of the first part, and the rights secured by these presents; which special stock or bonds or other securities shall be subordinate to the first-mortgage bonds aforesaid, and the income bonds hereinbefore provided to be issued in substitution for second-mortgage bonds. But the said special stock or bonds or other securities shall be issued only in respect to improvements of and additions to the said railroad, which, and estimates and specifications of which shall have been submitted to and approved by the said party of the
152 first part in writing, and all such improvements or additions shall be made in such manner as shall be approved by the said party of the first part. And in case of the issue of any stock or bonds by the party of the first part under this article, the party of the second part shall pay to the party of the first part, its successors or assigns an additional sum as annual rent of the demised premises, during the demised term, equal in amount to the annual interest or dividends upon such bonds or stock, and without affecting any of the other provisions of this lease.

Article eighth. It is hereby covenanted, promised and agreed by and between the parties to these presents, that if, at any time hereafter, any dispute or difference shall arise between them in regard to the true construction of these presents, or any provision thereof, or in respect to any matter or thing in these presents mentioned to be by either of them done or omitted to be done, such dispute or difference shall be at once submitted to arbitration, and to that end it shall be the duty of each of the parties hereto upon the occurrence of any such dispute or difference, to appoint, in writing, an arbitrator, to act on its behalf, for the settlement of the same; and to notify in writing the other party to this covenant of such appointment and it is covenanted and agreed that in case the party so notified, shall refuse, fail or omit to appoint an arbitrator to act on its behalf and no appointment of such arbitrator on the part of the party so notified shall be made within the space of thirty days after
153 the service of such notice, the party who shall have appointed and notified the appointment of such arbitrator may and shall forthwith nominate and appoint an arbitrator on the part and behalf of the party so refusing, failing or omitting to appoint one on its own behalf, although so notified in writing, to make such appointment as aforesaid, provided always that neither party shall nominate or appoint as an arbitrator hereunder, to act either on its own behalf, or on behalf of any party failing to appoint as aforesaid, any person interested in the decision of the dispute or difference, or any other than an impartial and disinterested person, acquainted

with the management and operation of railroads or learned in the law.

The arbitrators so appointed shall within a reasonable time after their appointment, enter upon their duties, either at Saint Paul, Philadelphia or New York, and their finding and decision, made after a reasonable opportunity shall have been afforded to each party to present its views and claims in respect to the matter in controversy, shall be final and conclusive, as between the said parties hereto in regard to such matter in controversy between them; but in case the said arbitrators so appointed shall be unable to agree upon a decision they shall choose an umpire, and the decision of such umpire if concurred in by either of said arbitrators, shall be final and conclusive in regard to the matter in controversy, submitted to him and in respect to which the said arbitrators shall have disagreed as aforesaid.

Article ninth. In case the said party of the second part its
154 successors or assigns shall at any time or times hereafter during the terms aforesaid, fail or omit to pay the rent hereinbefore mentioned or provided to be paid by the said party of the second part, or any part of such rent, when the same shall become payable, as hereinbefore specified or in case the said party of the second part its successors or assigns shall fail or omit to keep and perform the covenants and agreements herein contained, or any of them, and shall continue in default in respect to the performance of such covenant or agreement for the period of ninety days after the said party of the first part shall have in writing, required the performance of such covenant or agreement, then and in either and every such case it shall be lawful for the said party of the first part, its successors or assigns, at its or their own option, to enter in and upon the railroad and premises hereinbefore demised, and any and every part thereof, and remove all persons therefrom, and from thenceforth the said railroad and premises and all additions and improvements which shall or may have been made to the same to have, hold, possess and enjoy, as of the first or former estate of the said party of the first part, in the said demised premises; and upon such entry for non-payment of rent or breach, or non-performance of any covenant or agreement herein contained, to be by the said party of the second part, observed or performed, all the estate, right, title, interest, property, possession, claim and demand whatsoever of the said party of the second part, its successors or assigns, in or to the said demised railroad and premises as well as all the right title and
155 interest of the said party of the second part, its successors or assigns, in, under or by virtue of the leases or either of them hereinbefore assigned or transferred to the said party of the second part, or assumed by it shall wholly and absolutely cease, determine, and become void, anything hereinbefore contained to the contrary in anywise notwithstanding; but in case of re-entry as aforesaid, the rent provided in article second of these presents shall be apportioned from the times of the last preceding payments, up to the time of such re-entry. And it is further agreed and declared that such re-entry shall not waive or prejudice any claim or right of the

party of the first part to, or for damages, against the party of the second part, on account of such non-payment of rent, or non-performance or breach of the terms of this lease, and all such claims and rights are hereby expressly preserved to the said party of the first part.

Article tenth. The said party of the second part hereby covenants, promises and agrees to and with the said party of the first part, that at the end of said term or other sooner determination of this lease, the said party of the second part shall redeliver and surrender up to the said party of the first part, its successors or assigns, the said demised railroad and premises, in at least as good order and condition as the same shall be delivered to the said party of the second part under this lease, and with such additions, betterments and improvements as shall have been made thereto; and also with an amount and quality of rolling stock equal in value to the rolling stock which shall be delivered to the said party of the second part under this lease.

156 Article eleventh. And the said party of the first part hereby covenants promises and agrees to and with the said party of the second part, its successors and assigns, that the said party of the first part its successors and assigns, shall and will, at any time or times hereafter, and whenever thereunto requested by the said party of the second part, its successors or assigns, execute acknowledge and deliver to the said party of the second part, its successors or assigns at the proper cost and expense of the said party of the second part its successors or assigns, any and all such other or further instruments and assurances in the law for the better demising and leasing of the said railways and premises to the said party of the second part, its successors and assigns, upon and subject to all and singular, the rents, covenants, agreements and conditions hereinbefore reserved and mentioned, as by the said party of the second part, its successors or assigns, or by its or their counsel learned in the law, shall be reasonable advised, devised or required.

Article twelfth. It is hereby mutually agreed that whereas this indenture necessarily supercedes, during the continuance of the term thereby granted, the contract bearing date on the first day of January in the year of our Lord one thousand eight hundred and seventy-two made between the parties to these presents, relative to the operation and management of the portion of said Lake Superior and Mississippi railroad, between the point of junction of said railroad with the Northern Pacific railroad, at or near the town

157 of Thomson in Carlton county and the center line of Lake avenue in the city of Duluth, the said contract shall, during the continuance of this lease, be deemed suspended but the same shall not by virtue of these presents, become or be deemed wholly abrogated or annulled; and in case this lease shall for any reason, cease or be determined before the expiration of the term thereby granted, then the said contract shall revive, and from thenceforth the same shall be and continue in full force and operation, as if this said lease had not been made.

Article thirteenth. The said party of the second part hereby

agrees to advance, on account of the rent hereinbefore reserved, an amount equal to the six months' interest now maturing on the first-mortgage bonds of the said party of the first part and the first-mortgage bonds of the said Stillwater and Saint Paul, Minneapolis and Duluth and Minneapolis and Saint Louis Railroad Companies aforesaid respectively, provided that the coupons, representing such accruing interest, shall be transferred and delivered to the said party of the second part and shall be and continue valid in its hands for the purposes of securing the payment of such advances.

In witness whereof the parties hereto have caused their respective corporate seals to be hereunto affixed, and the same to be attested by the signature of their respective presidents and secretaries the day and year first above written.

FRANK H. CLARK,
[CORPORATE SEAL.] *Pres't Lake Sup. & Miss. R. R. Co.*
S. M. COLTON, JR.,
158 *Ass't Sec. Lake Sup. & Miss. R. R. Co.*
THE NORTHERN PACIFIC R. R. CO.,
By J. GREGORY SMITH, *President.*

[CORPORATE SEAL.]
SAM'L WILKESON,
Secretary Northern Pacific R. R'd Co.

Signed, sealed, and delivered in the presence of—
JAS. P. SINNOT.
CHARLES NETTLETON.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this 6th day of May, A. D. 1872, before me, Charles Nettleton, a commissioner of the State of Minnesota in and for the State of New York, residing in said city of New York, personally appeared Frank H. Clark, the president of the Lake Superior and Mississippi Railroad Company, and S. W. Colton, Junior, the assistant secretary of the same company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, the said Frank H. Clark, resided in the city of St. Paul, in the State of Minnesota; that he, the said S. W. Colton, Junior, resided in the city of Philadelphia, in the State of Pennsylvania; that he, said Clark, was the president and he, said Colton, Junior, was the assistant secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed thereto by order of the board of directors of
159 said company, and that they, the said Clark and S. W. Colton, Junior, signed their names thereto by the like order as president and assistant secretary of said company respectively, and they each acknowledged the foregoing instrument to be their own free and voluntary act and deed and the free and voluntary act and deed of the said company for the purposes therein mentioned; and

also, on the same 6th day of May, A. D. 1872, before me personally appeared J. Gregory Smith, the president of the Northern Pacific Railroad Company, and Samuel Wilkeson, the secretary of said last-named company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, the said J. Gregory Smith, resided in St. Albans, in the State of Vermont; that he, the said Wilkeson, resided in the said city of New York; that he, said Smith, was the president and he, said Wilkeson, was the secretary of the said company; that they know the corporate seal of said last-named company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed thereto by order of the board of directors of said company, and that they, the said Smith and Wilkeson, signed their names thereto by the like order as president and secretary of said company respectively, and they each acknowledged the foregoing instrument to be their own free and voluntary act and deed and the free and voluntary act and deed of the said company for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal.

160 CHARLES NETTLETON,

[SEAL.] *Commissioner for Minnesota in New York,*
117 *Broadway, N. Y. City.*

XXIX.

That pursuant to said agreement or lease mentioned in the preceding paragraph the said Northern Pacific Railroad Company operated the lines of railroad mentioned in said agreement of May 1, 1872, set out at length in the preceding paragraph, from the 1st day of May, 1872, until the 1st day of February, 1874.

XXX.

That on the 21st day of April, A. D. 1874, the said Northern Pacific Railroad Company and the said Lake Superior and Mississippi Railroad Company entered into an agreement executed by the duly authorized officers of said last-mentioned companies respectively, by the terms whereof said Northern Pacific Railroad Company surrendered all rights inuring to said Northern Pacific Railroad Company under said lease or agreement of May 1st, 1872, which said lease or agreement is set out at length in paragraph XXVIII hereof. Said agreement of April 21, 1874, is in words and figures following, to wit:

"This agreement, made the 21st day of April eighteen hundred and seventy-four, by and between the Northern Pacific Railroad Company, a corporation created and existing by and under the laws of the United States, party of the first part, and the Lake Superior and Mississippi Railroad Company, a corporation created and
161 existing under certain laws of the former Territory and present State of Minnesota, party of the second part, witnesseth:

Whereas, by an indenture bearing date the first day of May, eighteen hundred and seventy-two, made by and between the parties hereto, the said party of the second part did grant, demise and lease unto the said party of the first part, for the term of nine hundred and ninety-nine years, the railroad of the said party of the second part, situate and being in the State of Minnesota, together with the lands occupied thereby and connected therewith, and the equipments of said railroad belonging to the said party of the second part, and all rights, privileges and franchises of the said party of the second part, necessary to the operation and management of said railroad and the business thereof; and in and by the same indenture the said party of the second part assigned to the said party of the first part a certain lease and agreement, bearing date the first day of November, eighteen hundred and seventy, made by the Stillwater and St. Paul Railroad Company to the said party of the second part; and also two other leases and agreements, one made by the Minneapolis and Duluth Railroad Company and the other by the Minneapolis and Saint Louis Railway Company, to the said party of the second part, which two last-mentioned leases and agreements were by an instrument in writing dated on the 29th day of November, 1873, reassigned by the said party of the first part to the said party of the second part:

And whereas the said parties have mutually agreed that the
162 lease bearing date the first day of May, 1872, made by the said party of the second part to the said party of the first part, as aforesaid, and the estate, right, title and interest, thereby granted, demised and let, be terminated; and that the said lease and agreement made by the Stillwater and Saint Paul Railroad Company to the said party of the second part, and assigned to the said party of the first part be reassigned to the said party of the second part, and that said termination and reassignment shall take effect, and be, as of the first day of February last.

And whereas sundry parol agreements have been heretofore made by and between the said parties touching the use, occupation and connections of their respective railroads, and appurtenances and certain other arrangements are deemed proper, just and expedient, in consideration of the surrender and reassignment of the leases aforesaid, which should now, for greater certainty, be put in writing, duly executed, under the corporate seals of the parties.

Now therefore, it is hereby covenanted and agreed by and between the said parties, that for and in consideration of the covenants promises and agreements hereinafter contained, on the part of the said party of the second part, to be kept, fulfilled and performed, the said party of the first part has surrendered and relinquished to the said party of the second part the said indenture of lease bearing date the first day of May, eighteen hundred and seventy-two, made by and between the said parties, and the railroad premises, property and franchises, therein and thereby left, leased and demised;
163 and has reassigned and transferred to the said party of the second part the said lease and agreement made by the Stillwater and Saint Paul Railroad Company, and the railroad and the

property therein described; and the said party of the second part has accepted the said surrender and relinquishment of the said lease made by the said party of the second part to the said party of the first part, and the railroad, premises, property and franchises therein and thereby let, leased and demised; and has also accepted the said reassignment and transfer of the said lease and agreement made by the Stillwater and Saint Paul Railroad Company, and the railroad and property therein described.

And it is hereby mutually covenanted, promised and agreed by and between the said parties that the said surrender and relinquishment, reassignment and transfer, and the acceptance thereof, as aforesaid, were made as of the first day of February, eighteen hundred and seventy-four, and shall and will, in all respects and for all purposes, be deemed and taken to have been made, and have the same force and effect as if made, on that day, and that the relation between the said parties of lessor and lessee did on that day wholly cease and determine.

And the said party of the first part hereby covenants, promises and agrees, to and with the said party of the second part that it will well and truly save, indemnify and keep harmless the said party of the second part, its successors and assigns, of and from all loss, damage, costs, claim, demand, action, or forfeiture, that may in any manner have accrued, arisen, grown or been incurred in the
164 operation or management of the said leased lines of railroad hereby surrendered and restored to the said party of the second part, by reason, or on account of, any act, neglect, or omission by, or on the part of the said party of the first part, its officers, agents or servants, between the first day of May 1872, and the first day of February, 1874.

And the said party of the first part further agrees that, as soon as practicable, it will render an account to the said party of the second part of the business and operation of the said railroad of the said party of the second part, and of the said railroad of the Stillwater and Saint Paul Railroad Company from and including the first day of February, 1874, to the day when the said party of the first part shall cease to operate said last-named railroads for the said party of the second part after the execution and acknowledgment of this agreement, and it is hereby mutually covenanted, promised and agreed by and between the said parties, that in case the earnings of said last-mentioned railroads exceed the expenses of running, maintaining and operating the same, during the period last above mentioned, the said party of the first part will allow to the said party of the second part the amount of such excess; and in case the said earnings shall fall short of said expenses, the said party of the second part shall pay to the said party of the first part the amount of such deficiency.

And it — further mutually covenanted, promised and agreed by and between the said parties, that all wood and other railroad supplies on hand, belonging to the said party of the first
165 part when said party of the first part shall cease to operate said last-named railroads for the said party of the second part,

in use, or intended for use thereon, shall be taken and purchased by the said party of the second part, and the said party of the second part shall pay the said party of the first part therefor in cash, the appraised value thereof, as the same shall be jointly appraised agreed and determined by J. P. Ilsley, president of the said party of the second part and C. W. Mead, general manager of the Northern Pacific railroad.

And it is further mutually covenanted, promised and agreed by and between the parties hereto, that inasmuch as the said party of the first part has heretofore made and entered into, and shall and may hereafter make and enter into, contracts and agreements for the transportation of freight between the city of Saint Paul and various places on the Northern Pacific railroad, by the way of the railroad of the said party of the second part, the charges for the transportation of freight on all such contracts heretofore made and that may hereafter be made, shall, when collected, be apportioned *pro rata*, between the parties hereto, as follows: that is to say, for the transportation of freight, either way, between Saint Paul and Bismarck the said party of the second part shall be entitled to one-fifth, and the said party of the first part four-fifths, of the charges collected for such transportation, between Saint Paul and Fargo or Moorehead, either way, the said party of the second part shall be entitled to one-third, and the said party of the
166 first part to two-thirds of the charges collected for said transportation; and the allowance and apportionment to the said party of the second part of charges for the transportation of freight, either way, between Saint Paul and any other place or places than those above named, on the Northern Pacific railroad shall not exceed the *pro rata* of mileage of such transportation; and this agreement for the apportionment of charges for transportation shall apply as well to freight consigned from beyond the places above named as to the local freights. And it is further agreed that the said party of the second part, its officers, agents and servants, will, at all times until the expiration of the year 1874, recognize and treat as valid all passes heretofore issued by the general manager of the said Northern Pacific railroad, and now in force, for the free carriage of persons over the said Northern Pacific railroad and leased lines, and will give to the person and persons having and entitled to have, such passes free carriage over the railroads of the said party of the second part and its leased roads until the expiration of the present year.

And the said party of the second part, in consideration of the premises, and of one dollar to it paid by the said party of the first part, and for divers other good and valuable considerations it thereunto moving, does hereby covenant, grant, promise and agree to and with the said party of the first part, its successors and assigns, that the said party of the first part, its successors and assigns, shall and may, in the customary manner as to construction and
167 maintenance, have the right forever, to connect that certain railroad and railroad track constructed and laid by the said party of the first part in and along Dock street, in the city of Duluth

in the county of Saint Louis and State of Minnesota, with the main line and track of the railroad of the said party of the second part at the place where the same now connect, opposite, or nearly opposite the foot of First avenue east in said city of Duluth, and said connection forever to keep, have and enjoy; and also the perpetual right to use, in common with the said party of the second part so much of the main track, switches and sidings of the said railroad of the said party of the second part from said point of connection, northeasterly, as may be necessary for the proper and reasonable movement and management of locomotives, cars and trains, in transferring the same from the one to the other of said railroads, and also the perpetual right to use, in common with the said party of the second part, so much of the main track of the railroad of the said party of the second part, and its switches and sidings, as extend from said point of connection to and across the center line of Lake avenue, in said city of Duluth, that being the termination of that part of the said main line of railroad jointly owned by said parties hereto, according to the deed upon condition heretofore made by and between said parties and bearing date the first day of January, A. D. 1872.

And the said party of the second part, in consideration of the premises and for the other considerations hereinbefore mentioned and referred to, does hereby further covenant, grant promise
168 and agree, to and with the said party of the first part that it, the said party of the first part, its successors and assigns, shall have the right, forever to use, operate and enjoy, without payment or charge therefor, in common with the said party of the second part, the railroad track now constructed and laid from the main line of the Lake Superior and Mississippi railroad, near the round-house in said city of Duluth, to, down and along the southwest side of Rice's point, together with the appurtenances thereto belonging, or therewith connected: and, further that the said party of the first part, its successors and assigns, shall have the exclusive right to possess, use, occupy and enjoy the building and stalls and each and every of them, with their appurtenances, easements and appliances, erected, constructed and furnished by the said party of the first part, at the round-house aforesaid, and the right of ingress and egress to and from the same, until the expiration of twelve months' notice to be given by the said party of the second part, its successors and assigns, that it or they require the use thereof for itself or themselves, and until the said party of the second part, its successors or assigns, shall have fully paid to the said party of the first part, its successors or assigns the then value of said building, stalls and appurtenances and appliances as aforesaid.

And inasmuch as the said party of the first part has paid laid out, and expended large sums of money for, in and about the construction of the canal across Minnesota point at said city of
169 Duluth, and the improvement of the harbor of Duluth, one-half of which was, and is, by agreement heretofore made by and between the said parties, to be paid by the said party of the second part: Now therefore, the said party of the second part, in

consideration thereof, and of the hereinbefore-recited premises and for the other considerations aforesaid, does hereby covenant, promise and agree to and with the said party of the first part, that it, the said party of the second part, its successors or assigns, shall and will, well and truly and faithfully, pay to the said party of the first part, its successors or assigns, one-half the entire cost of the said canal and harbor improvement, said payment to be made as follows: that is to say, a sum of money equal to one-fourth of the entire amount of said cost to be paid at the time of the execution of this agreement, and the remainder, being a sum of money equal to one-fourth of the entire amount of said cost, to be paid, when the said party of the first part shall vacate that portion of the Dock Street front on the bay of Duluth between the center line of Ninth avenue west, produced, and the southwest line of Fifth avenue west, produced as hereinafter agreed to be vacated by the said party of the first part.

And whereas the said party of the first part, while the said indenture of lease bearing date the first day of May, 1872, was in full force, and the said party of the first part was lawfully seized of the estate thereby granted and demised, did make an agreement to let and lease, and did lease, to Munger Brothers of Duluth aforesaid, certain of said lands and premises, situate and being in
170 the said city of Duluth, for the purpose of erecting thereon an elevator and a flouring mill, and described as follows: viz: that certain piece or parcel of land and premises extending from Dock street, southeasterly into the bay of Duluth, and bounded on the northeast by the southwest line of Fourth avenue west, produced into the bay, and on the southwest by the southwest line of Fifth avenue west, produced into the bay, together with the water, rights and appurtenances thereto belonging, and whereon the said Munger Brothers have constructed an elevator: Now therefore, for the purpose of confirming said lease to the said Munger Brothers, the said party of the second part does hereby covenant, grant, promise and agree to and with the said party of the first part, that it the said party of the first part, its successors and assigns shall and may have and enjoy, without charge, cost or payment, therefor, the exclusive right, possession, occupancy and control to and of the said lands and premises last above described with the said rights and appurtenances thereto belonging, for and during the term and terms for which the same have been leased or agreed to be leased to the said Munger Brothers, as aforesaid, and to have, receive, possess, and enjoy the rents, issues, and profits thereof during that period: Provided always, and upon conditions that said lands and premises, and no part thereof, shall be used or occupied for any other than for elevator and flouring-mill purposes, and business properly and reasonably belonging thereto or connected therewith.

And the said party of the second part, for the considerations
171 hereinbefore expressed and referred to, does hereby further covenant, grant, promise, and agree to and with the said party of the first part, that it, the said party of the first part, its successors and assigns, shall and may have, hold, possess, occupy and

enjoy forever, without cost, charge or payment therefor, the right of way on and over the lands and premises owned by the said party of the second part, or in or to which it now has or may hereafter acquire, any interest, right, or title, legal or equitable, in common or in severalty, from Third street of Rice's Point division of said city of Duluth, along the line of the railroad constructed by the said party of the first part, commonly known as the Dock Street track, to its connection with the main line of the railroad of the said party of the second part, at or near the foot of First avenue east, said right of way to extend to the width sufficient for a double-track railroad with the necessary appurtenances along and including the present single track of said railroad known as the Dock Street track.

And it is hereby mutually covenanted, promised and agreed by and between the parties hereto, that the single-railroad track now laid through Dock street, from its connection with the main line of the said Lake Superior and Mississippi railroad near Twenty-first avenue west, in said city of Duluth, to its connection with said main line at or near the foot of First avenue east, shall be common to both the parties hereto, and their respective successors and assigns, so soon as the said party of the second part, its successors and assigns, shall pay to the said party of the first part its successors
172 or assigns, one-half the value thereof, at the time of such payment; and when said payment shall be made the said party of the first part, its successors or assigns, shall, on the written request of the said party of the second part, its successors or assigns execute and deliver to it or them such further instrument or instruments as may be reasonably devised, advised or required by the said party of the second part, its successors or assigns or by its or their counsel learned in the law, to secure, assure and confirm, to the said party of the second part, its successors or assigns, forever, the right to use the said track, of the said Dock Street railroad, in common with the said party of the first part its successors and assigns.

And whereas the said party of the first part has made, constructed and erected valuable and permanent improvements of the bay of Duluth in front of that part of Dock street in said city of Duluth hereinafter particularly described according to the agreement and understanding heretofore made and existing by and between said parties in relation thereto, it is hereby mutually covenanted promised and agreed by and between said parties, that the said party of the first part its successors or assigns, shall vacate, quit and surrender to the said party of the second part, its successors or assigns, the said Dock Street front last above mentioned, and particularly described as follows, that is to say: all the land and premises extending from said Dock street into the bay of Duluth and bounded on the northeast by the southwest line of Fifth avenue west, produced into the bay, and on the southwest by the center line of Ninth
173 avenue west, produced into the bay, at the expiration of twelve months' notice in writing, by the said party of the second part, its successors or assigns, to the said party of the first

part its successors or assigns, to vacate, quit and surrender the same and on the full payment by the said party of the second part, its successors or assigns, of the then value of all improvements made on said last above described premises by the said party of the first part, and that shall have been made thereon by the said party of the first part, its successors or assigns.

And that the said party of the first part, its successors or assigns shall and may have the exclusive quiet possession, control, occupancy and enjoyment of all said last above described premises without cost, charge or payment therefor, until the expiration of said notice to vacate, quit and surrender the same, and until full payment of the then value of said improvements as aforesaid.

And the said party of the second part, in consideration of the premises, does hereby covenant, promise and agree to and with the said party of the first part, that if the said party of the first part is released and discharged since the first day of February eighteen hundred and seventy-four, from all claim and demand for, or on account of the rental provided for in said indenture made by and between the parties hereto, bearing date the first day of May, A. D. 1872, and from all the covenants, promises and agreements in said indenture of lease contained on the part of the said party of the first part, hereto to be performed, kept and fulfilled, and from
174 all claim, demand and liabilities whatever, by reason or on account or growing out of the said indenture bearing date the first day of May 1872, or of anything therein contained.

In witness whereof the parties hereto have caused their respective corporate seals to be hereunto affixed, and the same and these presents to be attested by the signatures of their respective presidents and secretaries, the day and year first above written.

G. W. CASS,
President of the Northern Pacific Railroad Company.

[CORPORATE SEAL.]

SAM'L WILKESON,
Secretary of the Northern Pacific Railroad Company.

Signed, sealed, and delivered in presence of—
A. L. PRITCHARD.
GEORGE FOLLETT.

JOHN P. ILSLEY,
President of the Lake Superior and Mississippi Railroad Company.

[CORPORATE SEAL.]

THOS. M. DAVIS,
Secretary of the Lake Superior and Mississippi Railroad Company.

Signed, sealed, and delivered in the presence of—
FRANK H. CLARK.
EDW'D ELDREDGE.

STATE OF NEW YORK, }
City and County of New York, } ss:

On this twenty-first day of April, A. D. 1874, before me, a
175 commissioner in and for the State of New York, duly appointed and commissioned by the governor of the State of Minnesota to take the acknowledgment and proof of the execution of deeds and other instruments to be used and recorded in the State of Minnesota, personally came George W. Cass, to me known to be the president of the Northern Pacific Railroad Company, who, being duly sworn, did depose and say that the seal affixed to the foregoing indenture as the seal of the Northern Pacific Railroad Company is the common or corporate seal of the said corporation; that the said seal was affixed in his presence by order of the board of directors of the said corporation, and that the said indenture was duly sealed and delivered as and for the act and deed of the said corporation, and that the name of the said George W. Cass and also of Sam'l Wilkeson, the secretary of the said corporation, is and are their respective handwriting; and on the same twenty-first day of April, A. D. 1874, before me also personally appeared John P. Ilsley, the president of the Lake Superior and Mississippi Railroad Company, and Thomas M. Davis, the secretary of the same company, who are to me respectively personally known to be such, and, being by me severally duly sworn, did depose and say that he, the said John P. Ilsley, was the president of said company; that he, the said Thomas M. Davis, was the secretary of the same company; that he, the said John P. Ilsley, resided at Philadelphia, in the State of Pennsylvania, and that he, the said Thomas M. Davis, resided at St. Paul, in the State of Minnesota; that they know the corporate seal of said last-named company; that the seal affixed to the
176 foregoing instrument was such corporate seal; that it was so affixed thereto by order of the board of directors of said last-named company, and that they signed their names thereto by the like order, as the president and secretary of said company respectively, and the said John P. Ilsley and Thomas M. Davis severally acknowledged that they had executed the said instrument, and that the same was their free and voluntary act and deed and the free and voluntary act and deed of said last-named company for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal.

GEORGE FOLLETT,

[SEAL.] *Commissioner for Minnesota in New York City.*"

XXXI.

That thereafter and on the 12th day of May, 1874, the said Northern Pacific Railroad Company and the said Lake Superior and Mississippi Railroad Company, by their duly authorized agents, executed a memorandum of agreement in the words and figures following, to wit:

"Memorandum of agreement May 12th, 1874, for working joint business between Northern Pacific Railroad Co. and Lake Superior and Mississippi Railroad Co.

All station expenses—road expenses, including maintenance, watching of bridges, &c., between Northern Pacific junction and Duluth—but not including station expenses at Duluth are to be divided and borne equally by the two companies.

The L. S. & M. R. R. Co.'s superintendent, Geo. H. Smith, to have charge of the working of that portion of railway as owned
177 jointly by the two companies, and see to its repairs and maintenance. All such repairs and maintenance to be settled by the L. S. & M. R. R. Co., on their monthly pay-rolls and vouchers.

At N. P. junction the expenses are to be divided equally. At Duluth, the L. S. & M. R. R. Co. are to pay such a proportion of the whole expense of the station, as their tonnage bears to the whole tonnage handled at the station during the month as by the report of the agent. Each passenger to be counted as one ton. These station expenses to cover all the labor employed at the station or in the yard. The engines and engine service to be divided equally—that is, each company to furnish as required.

N. P. junction and Duluth station expenses and pay-rolls will be reported to N. P. R. R. Co. and paid by them.

All wood used upon the railroad between N. P. junction and Duluth to be furnished by the L. S. & M. R. R. Co., and they are to make a charge for such as is used by the N. P. engines of four dollars per cord in the rack as measured ready for engines to take.

All freights from or to the L. S. & M. R. R. passing over the Northern Pacific docks and over Dock Street track, the L. S. & M. R. R. Co., are to pay 12½ cents per ton to N. P. R. R. Co., for the use of said docks and tracks, the use of the docks for storage purposes to be additional as to be agreed upon.

All freight belonging to N. P. R. R. Co., such as supplies
178 for their own use on their railroad, are to be transported from St. Paul to N. P. junction for 15 cents per 100 pounds or $20.00 per car when in car-loads.

When Northern Pacific engines or cars are used by L. S. & M. R. R. Co., they are to receive $15.00 per day for locomotives, four (4) dollars per day for passenger cars, three (3) dollars per day for baggage cars and one (1) dollar per day for freight cars. This price to cover cars in continual use by L. S. & M. R. R. from the day they are taken to the day they are returned, Sundays excepted, and is not intended to cover use of N. P. cars on L. S. & M. R. R. when moving in ordinary business between the two companies, when the usual rates for car service are to be paid. Cars to be examined and returned in as good order as when taken, ordinary wear and tear excepted.

C. W. MEAD,
Gen'l Manager N. P. R. R.
JOHN P. ILSLEY,
Pres't L. S. & M. R. R. Co."

XXXII.

That thereafter and on June 8, 1876, the said Northern Pacific Railroad Company and the said Lake Superior and Mississippi Railroad Company, by their duly authorized agents, entered into a memorandum of agreement in the words and figures following, to wit:

"Memorandum of agreement, made June 8th, 1876, between the Northern Pacific Railroad Co. and the Lake Superior & Mississippi Railroad Co. for the operation of the railroad between Duluth and the Northern Pacific junction and fixing rates for certain service and use of property.

179 The Lake Superior & Mississippi Railroad Co.'s superintendent Geo. H. Smith, is to have charge of the working of the road, and to see to its renewals and repairs, and to pay for the same from funds of the L. S. & M. R. R. Co., on monthly vouchers and pay-rolls.

The Northern Pacific Railroad Co., is to repay to the L. S. & M. R. R. Co., monthly one-half of the cost of repairing and renewing the said road, including the watching of bridges, also one-half of the station expenses thereon, including the junction, but excluding Duluth.

At Duluth, the Northern Pacific R. R. Co., is to be charged during the season of lake navigation, with the full salary of one clerk for bonded goods, not to exceed sixty-five dollars per month.

All other expenses of Duluth station, including yard labor are to be divided monthly in the proportion that each party's tonnage at the station bears to the whole amount handled there during the month. Each passenger to be counted as one ton.

Each party to furnish locomotives as required for its proportion of yard service at Duluth or junction.

The L. S. & M. R. R. Co., is to furnish wood when required between Duluth and N. P. junction, at a charge of three dollars per cord on the rack, as measured ready to put on the tender.

For all freights from or to the L. S. & M. R. R. passing over the Northern Pacific wharves and Dock Street tracks, the L. S.
180 & M. R. R. Co. is to pay to the N. P. R. R. Co. twelve and a half cents per ton. If said wharves are used by the L. S. & M. R. R. Co., for storage purposes, they shall pay to the N. P. R. R. Co, an additional price for storage, as may from time to time be agreed upon.

Freights belonging to the N. P. R. R. Co., such as supplies, for their own use on their railroad, are to be transported from St. Paul to N. P. junction for fifteen cents per one hundred pounds, or, not to exceed twenty dollars per car.

This contract to be terminated at any time after 1876, by either party giving the other one month's notice of such a desire to terminate it.

LAKE SUPERIOR & MISS. R. R. CO.,
By JOHN P. ILSLEY, *Pres't.*
NORTHERN PACIFIC R. R. CO.,
By W. S. ALEXANDER, *Gen. Bus. Agent.*"

XXXII A.

That the act of the Congress of the United States entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," approved May 5, 1864, Thirteen Statutes at Large, page 66, shall be considered to be in evidence herein, and may be considered by the court as fully as if set out at length; that no railroad was ever constructed under the provisions of section 3 of said act of May 5, 1864, from Bayfield, in the State of Wisconsin, to Superior, on Lake Superior, in the State of Wisconsin.

XXXIII.

That the minutes of the board of directors of the Northern Pacific Railroad Company from December 7, 1864, which is
181 the date of the first meeting of the said board of directors up to the 18th day of May, 1865, appear to be full and complete, and said minutes show no action by said board of directors with reference to locating the line of the road of the said Northern Pacific Railroad Company under said act of Congress of July 2, 1864, and said minutes show no action by said board of directors conferring authority upon the president of said company to locate said line.

XXXIV.

That the powers of the president of the said Northern Pacific Railroad Company, as conferred by the by-laws of the said company adopted January 11, 1865, are in the words and figures following, to wit:

"*The President.*

The president shall have power to call meetings of the board of directors at such time and place as he shall think proper to appoint; and it shall be his duty to call such meetings whenever requested so to do in writing by any three members of the board.

It shall be his duty to preside at all meetings of the board, to appoint all committees not otherwise appointed, to preserve order, promote the regular and speedy transaction of business, and generally to exercise the same supervisory power and direction over all the affairs, departments, and employees of the company as are commonly exercised by the presiding officer of such companies.

He shall be a member *ex officio* of all such standing and select committees.

182 All letters, reports, and papers of every description received by the secretary or treasurer pertaining to the business of the company shall be submitted to the president, and all instructions emanating from those officers shall be first approved by him, except in cases directed and ratified by the board.

The president shall have the custody of all the official bonds of the company, and keep them together as a special deposit, subject to the orders of the board.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

The president may also exercise such other powers and perform such other duties as the board of directors may from time to time confer or prescribe."

XXXV.

That the said Northern Pacific Railroad Company caused and procured the passage of chapter 465 of the private and local laws of the State of Wisconsin for the year 1865, being an act entitled "An act to authorize the Northern Pacific Railroad and Telegraph Company, incorporated by an act of Congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route,' approved July 2, 1864, to construct their railroad and telegraph line through the State of Wisconsin," which said act is set out at length in paragraph VIII½ of this stipulation.

XXXVI.

That upon the receipt by the Commissioner of the General Land Office of the map mentioned in paragraph XXV of this stip-
183 ulation, transmitted to the Secretary by Josiah Perham, president of the Northern Pacific Railroad Company, on March 6, 1865, said Commissioner, on the 22nd day of June, 1865, transmitted a letter to the Secretary of the Interior, recommending that said map, so transmitted by the said Josiah Perham, be rejected for the reason that the same did not comply with the rules and regulations of the Land Department, and thereupon said recommendation was approved by the said Secretary of the Interior by endorsement on said letter of the Commissioner of the General Land Office.

Objections.

Respondent, The Northern Pacific Railway Company, objects to the consideration of the map of March 6, 1865, mentioned in paragraph XXV herein and shown by Petitioner's Exhibit "A," on the ground that said map, as shown by Exhibit "A," appears on its face to have been altered by the crossing out or erasure of the lower of the two red lines thereon extending westwardly from Lake Superior, and no facts are shown explaining such alteration or erasure; and respondent further objects to the consideration of said map on the further ground that said map is incompetent, immaterial, and irrelevant in this proceeding for the reason that it is not shown that said map was prepared or filed by the Northern Pacific Railroad Company or the board of directors of said company or by their authority.

CROWNHART, OWEN & FOLEY,
Attorneys for Petitioner, Andrew Doherty.
LOUIS HANITCH &
JAMES B. KERR,
Attorneys for Respondent, Northern Pacific Railway Company.

(Here follow maps marked pp. 184, 185, 186, 187, and 188.)

189 The said parties then stated in open court that the said stipulation contained all the facts and evidence that they desired to present in said proceeding. The taking of testimony was then closed, and the foregoing is all the evidence given on both sides upon said hearing.

And the court thereupon made and entered an order herein appointing commissioners, which order is of record.

And because the foregoing evidence, objections, rulings, and exceptions do not appear of record, I, the undersigned, the judge who presided at said hearing and heard the parties interested, have, on due notice, settled and signed this bill of exceptions to the end that the same be made part of the record herein this 3rd day of July, A. D. 1897.

C. SMITH, *Judge.*

(Endorsed:) State of Wisconsin, county of Douglas. In superior court. In the matter of the petition of Andrew Doherty for the appointment of commissioners, &c. Bill of exceptions. It is hereby stipulated and agreed that the within proposed bill of exceptions may be settled and signed by the judge of said superior court as the bill of exceptions in the above-entitled proceeding. Dated July 3rd, 1897. Crownhart, Owen & Foley, att'ys for Andrew Doherty, petitioner. James B. Kerr and Louis Hanitch, att'ys for N. P. R'y Co. Filed July 3, 1897. Wm. H. Locke, clerk superior court, Douglas Co., Wis. Filed July 6, 1897. Clarence Kellogg, clerk of supreme court Wis.

190 STATE OF WISCONSIN:

Douglas County Superior Court.

In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners to Appraise Certain Real Estate Taken by the Northern Pacific Railway Company for a Portion of its Line in Douglas County, Wisconsin.

The above-entitled proceeding having come before this court upon the hearing of the petition of Andrew Doherty, filed herein, the said hearing having been duly adjourned to this time, and the said petition having been presented to this court, together with proof of the service and publication of the notice required to be given herein, Messrs. Crownhart, Owen & Foley appearing as attorneys for Andrew Doherty, petitioner herein, and James B. Kerr, Esq., and Louis Hanitch appearing as attorneys for The Northern Pacific Railway Company, respondent herein, and the said Northern Pacific Railway Company having served and filed herein its answer showing cause against the granting of the prayer of said petition, and the said parties having presented and filed a stipulation in writing setting forth all of the facts touching the issues made herein, and the said parties having in open court agreed and consented to submit the issues made herein by the said petition and

answer to this court for determination upon the said stipulation and upon all the files herein, and the court having examined said stipulation and all of the files herein and being fully advised in the premises:

Now, therefore, upon motion of Messrs. Crownhart, Owen & Foley, it is hereby ordered and adjudged that the said Andrew Doherty, petitioner herein, is the owner in fee-simple of the land described in the said petition and more particularly delineated upon the map annexed to said petition.

It is hereby ordered and adjudged that the said Northern Pacific Railway Company is entitled to take and use for the purpose
191 of its right of way, upon making compensation therefor, the land described in said petition and upon which strip of land the said railway company is now maintaining and operating its said road and track.

And it is hereby further ordered and adjudged that it is necessary for the said railway company to take and have for its right of way the said land described in said petition; and

It is hereby ordered and adjudged that no sufficient cause is shown by the said Northern Pacific Railway Company against granting the prayer of the petition of Andrew Doherty herein.

It is hereby ordered and adjudged that Fred. B. Southern, B. T. Randall, and S. W. Whitmore, being three disinterested and competent freeholders who reside in said county of Douglas, where the premises to be appraised are situated, be, and they are hereby, appointed commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate described in said petition and determined necessary to be taken in said county of Douglas and State of Wisconsin for the uses and purposes of the said Northern Pacific Railway Company, and to do and perform all of the several duties of commissioners which said commissioners are authorized to perform by the statute in that behalf made and provided, and shall hold their said office and appointment for the term of one year from the date hereof; and

It is hereby further ordered and adjudged that the first meeting of said commissioners shall be held on the 5th day of July, A. D. 1897, at nine o'clock in the forenoon of that day, at the office of the clerk of said superior court in the Trade and Commerce building, in West Superior, in the city of Superior, in said county of Douglas; and

It is hereby further ordered and adjudged that the commissioners shall cause notice of the time, way, and place where they
192 will meet to consider the amount of the compensation to which said owners or persons interested in said real estate are entitled to be given to the said Northern Pacific Railway Company or other parties interested. Said notice shall be personally served on the said railway company or its authorized agents or attorneys at least six days before the time of such meeting.

And it is hereby further ordered and adjudged that said commissioners shall be entitled to a compensation at the rate of five dollars ($5.00) per day for the time actually and necessarily employed

in the discharge of their duties as such commissioners, and all necessary expenses incurred by them in the discharge of their duties.

Dated June 30, 1897.

By the court:

C. SMITH, *Judge.*

(Endorsed:) (Original.) 23–8. State of Wisconsin, Douglas county. Superior court. In the matter of the petition of Andrew Doherty for the appointment of commissioners to appraise certain real estate taken, &c. Order appointing commissioners. Filed June 30, 1897. Wm. H. Locke, clerk superior court, Douglas Co., Wis. Filed July 6, 1897. Clarence Kellogg, clerk of supreme court Wis.

193 STATE OF WISCONSIN, } *ss.*:
County of Douglas, }

In Superior Court.

I, Wm. H. Locke, clerk of the superior court in and for said county and State, do hereby certify that the annexed papers were filed in my office on the dates thereon indicated, are all the original papers on file in my office in an action entitled In the matter of the petition of Andrew Doherty for appointment of commissioners to appraise certain real estate taken by the Northern Pacific Railway Company for a portion of its line in Douglas county, Wisconsin, and that the same are transmitted to the supreme court of the State of Wisconsin in pursuance of a notice of appeal and undertaking hereto attached.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 3rd day of July, A. D. 1897.

[SEAL.] WM. H. LOCKE, *Clerk,*
By F. J. CHRISTOPHER, *Deputy.*

(Endorsed:) Filed July 6, 1897. Clarence Kellogg, clerk of supreme court Wis.

194 And afterwards, to wit, on the twelfth day of January, A. D. 1898, the same being the second day of said term, the following proceedings were had in this court in this cause—that is to say:

In re Petition of ANDREW DOHERTY for the Appointment of Commissioners, &c.

Douglas Superior Court.

THE NORTHERN PACIFIC RAILWAY COMPANY, Appellant, }
vs.
ANDREW DOHERTY, Respondent. }

And now, at this day, came the parties herein, by their attorneys; and this cause having been argued by J. B. Kerr, Esq., for the said appellant, and by W. R. Foley, Esq., for the said respondent, and

submitted, and the court, not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

195 And afterwards, to wit, on the twenty-third day of June, A. D. 1898, the same being the fifty second day of said term, this court rendered its judgment in this cause in the words and figures following—that is to say:

In re Petition of ANDREW DOHERTY for the Appointment of Commissioners, &c.

Douglas Superior Court.

THE NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
ANDREW DOHERTY, Respondent.

This cause came on to be heard on appeal from the order of the superior court of Douglas county and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the order of the superior court of Douglas county entered on the 30th day of June, A. D. 1897, in this cause, be, and the same is hereby, reversed, with costs against the said respondent, taxed at the sum of one hundred and ninety-one and $\frac{86}{100}$ dollars ($191.86).

And that this cause be, and the same is hereby, remanded to the said superior court with directions to dismiss the petition herein.

Justice Bardeen took no part.

196 Upon the rendering of which said judgment the court, by Justice Winslow, filed its opinion herein in the words and figures following—that is to say:

197 In the Matter of the Petition of ANDREW DOHERTY for the Appointment of Commissioners in Condemnation Proceedings.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
ANDREW DOHERTY, Respondent.

This is an appeal from an order appointing commissioners in condemnation proceedings upon the petition of Doherty. Doherty owns the southwest quarter of section 4, township 47 north of range 11 west, in Douglas county, Wisconsin, having made a homestead entry thereof November 8th, 1882, and obtained a patent February 6th, 1890. The appellant claims a right of way from east to west 100 feet in width across this quarter section upon which its railway line is constructed and operated. This right of way has never been acquired by the appellant or its grantor, the Northern Pacific Railroad Company, by purchase or by condemnation, but

the appellant claims it by virtue of the terms of the act of Congress approved July 2nd, 1864, incorporating the Northern Pacific Railroad Company and granting to it, among other rights and privileges, a right of way through the public lands of the United States. This act authorized the corporation thereby created to construct a railroad "beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin," westward to "some point on Puget's sound," and the controlling question in this case is whether the eastern terminus of the railroad constructed under the act is at Duluth, Minnesota, or at Ashland, Wisconsin. If at Duluth, then the company acquired no right of way over any public lands in Wisconsin; but if at Ashland, then it did acquire a right of way over public lands in Wisconsin, including the land in question, by virtue of the act of incorporation.

The facts were not in dispute and were all settled by a
198 written stipulation. From this stipulation the following facts appear: On July 2nd, 1864, the land in question was public land of the United States. On November 8th, 1882, the petitioner Doherty made a homestead entry thereof, and thereafter complied with the homestead laws and received a patent from the United States purporting to convey the lands February 6th, 1890. In December, 1885, the Northern Pacific R. R. Co. took possession of the strip in controversy and constructed a railroad upon it and remained in possession, operating the railroad, until August 31st, 1896, when all the property, rights, and franchises of said railroad company were sold to the appellant, The Northern Pacific Railway Company, a Wisconsin corporation, which is duly organized to operate said railroad, and has occupied said strip for railroad purposes. The Northern Pacific Railroad Company, of which the appellant is the successor in interest, was organized by and obtained its rights under an act of Congress approved July 2nd, 1864, and entitled An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast by the northern route. By the first section of this act a corporation created thereby was authorized to lay out and construct a continuous railroad and telegraph line, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly upon the most eligible route as shall be determined by said company within the United States and north of the 45th degree of latitude to some point on Puget's sound. By the second and third sections of the same act the right of way through the public land of the United States was granted to said railroad company, its successors and assigns, for the construction of the line, and it was also provided that if its route should be found to be upon the same gen-
eral line as the route of another railroad which owned a pre-
199 vious land grant from the U. S., the amount of said previous land grant should be deducted from the amount granted by this act, provided that the railroad owning the previous grant might assign its interest to the Northern Pacific R. R. Co. or might consolidate, confederate, and associate with said company upon the terms named in the first section of the act. The lands granted to

the Northern Pacific R. R. Co. by the act amounted to 10 alternate sections per mile on each side of the line within the States, and 20 alternate sections in the Territories, with a ten-mile indemnity limit, and by resolution of Congress, May 31st, 1870, an additional indemnity belt ten miles in width was created on each side of the line. This act was accepted by the company within the time required by law. The act also required the company to procure legislative consent of the States through which it was to run before its construction, and in the year 1865 the legislatures of Minnesota and Wisconsin gave such consent, the Minnesota act providing that if the eastern terminus of the road should be located east of the eastern boundary of Minnesota, then that the company should construct or cause to be constructed a railroad from its main line to the navigable waters of Lake Superior at some point within the State of Minnesota.

In 1870 the company located its general route from the mouth of the Montreal river in Wisconsin across Wisconsin and Minnesota to a point on the Red River of the North near Fargo, and transmitted a map showing this location August 13, 1870, to the Secretary of the Interior. This map showed the proposed general route to commence at the mouth of the Montreal river, thence a little south of west upon a direct line to a point directly south of and about six miles distant from the south end of Chequamegen bay; thence a little north of west upon a direct line crossing the State boundary between Wisconsin and Minnesota, at or near the point where the St. Louis river becomes such boundary. Upon re-
200 ceipt of this map the Secretary of the Interior transmitted it to the Land Commissioner, with instructions to withdraw from sale, homestead, and pre-emption all odd-numbered sections of land within twenty miles of the line within both States. This order was complied with by the Land Commissioner by directions given to the district land officers at Bayfield, Wis. Such withdrawals were made and the price of the even-numbered sections was raised to $2.50 per acre, and thereafter large quantities of such land were sold by the Government at the rate of $2.50 per acre. In 1882 a map of definite location of said railroad from a point upon the St. Paul & Duluth R. R. now called Thomson junction eastward to a point in section 15, township 47 north of range 2 west, in the State of Wisconsin, was prepared and approved by the directors and certified and forwarded to the Secretary of the Interior. The line of definite location laid down on this map followed substantially the line of general location upon the prior map, but it turned to the north and touched Superior, and also Ashland, and stopped some ten miles west of the mouth of the Montreal river. Upon receipt of this map of definite location the Land Commissioner, by direction of the Secretary of the Interior, adjusted the land grant in accordance with it, and prepared diagrams showing the limits of the grant and indemnity belts, and transmitted such diagrams to the district land officers with the proper directions as to the withdrawal of lands, which were complied with.

August 2, 1884, the directors of the N. P. R. R. Co. adopted a resolution fixing the eastern terminus of the railroad at the city of

Ashland, which resolution was duly certified and transmitted to the Commissioner of the General Land Office December 3rd, 1884. Thereafter the Commissioner prepared a diagram showing the final eastern terminus of the line at Ashland, and sent the same to the district officers at Bayfield, with instructions to adjust the
201 grant on this basis. The point so fixed is on the line of definite location of July 6th, 1882, but about twelve miles west of the east end of that line. The N. P. R. R. Co. constructed a continuous line of railroad from the city of Ashland to Puget's sound, in all respects in accordance with its act of incorporation, and the whole line has been duly accepted by the President of the U. S., as provided in that act. That portion of the road extending east from Thomson junction was constructed upon the line of definite location shown in the map of 1882, and was so constructed during the years 1881, 1882, 1883, and 1884.

The first section extended from Thomson junction to Superior, and was examined and reported favorably upon by commissioners in 1882, and the recommendations were approved by the President September 16th, 1882; the second section, extending from Superior to the Brule river, was constructed in the latter part of 1883, and crossed the land in question here, and was approved in like manner January 31st, 1884; the third section extended from the Brule river to Ashland, and was approved in like manner February 18th, 1885. It appears further that, March 6th, 1865, one Josiah Perham, then the president of the N. P. R. R. Co., transmitted to the office of the Land Commissioner a map purporting to show the proposed general route of the N. P. R. R. Upon this map there appeared two lines from a point in the present State of North Dakota eastward, one terminating upon Lake Superior at or near Duluth, and the other extending into Wisconsin some distance south of Lake Superior and terminating at the mouth of the Montreal river, this last-named line being apparently partially obliterated by a wavy red line. This map was accompanied by a letter from Perham stating that it shows the general line of the N. P. R. R. from a point on Lake Superior in Wisconsin to a point on Puget's sound. The Secretary
202 of the Interior transmitted this map to the Land Commissioner suggesting the withdrawal of the lands along the line, but the Land Commissioner soon afterward transmitted a letter to the Secretary of the Interior recommending that the map be rejected, for the reason that the same did not comply with the rules of the Land Department, which recommendation was approved by the Secretary. There is nothing to explain the apparent alteration of this map nor to show when it was made, and it is not shown that the directors of the company ever authorized the making or filing of the map, but it appears that the president of the company had no power to make or file it.

By act approved May 5, 1864, Congress granted ten sections of land per mile to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior. In the same year the legislature of Minnesota conferred this grant upon the Lake Superior and Mississippi R. R. Co, a Minnesota corporation, and

afterwards known as the St. Paul & Duluth R. R. Co. On January 1st, 1872, this company had constructed and was operating a railroad from St. Paul to Duluth by way of Thomson junction, which is upon the St. Louis river and is the point from which the N. P. R. R. Co. started to build its line westward. On the last-named date the N. P. R. R. Co. purchased a one-half interest in that part of this road extending from Thomson junction to Duluth for the sum of $500,000, and received a deed therefor. On the same day the two companies made a written agreement providing for the operation of trains and the maintaining of the road. On May 1st, 1872, the N. P. R. R. Co. and the Lake Superior and Mississippi R. R. Co. made a further agreement by which the lines of the L. S. & M. R. R. were leased to the N. P. R. R. for an annual rental, the land grant of the L. S. & M. R. R. being expressly excepted from the operation of the lease. Pursuant to this lease the N. P. R. R. Co.
203 operated the entire railroad thus leased from May 1st, 1872, until February 1st, 1874, when it surrendered the lines leased and relinquished all its interest under the lease, but surrendered no rights under the deed. On the 12th of May, 1874, the N. P. R. R. Co. and the L. S. & M. Co. made an agreement for the operation of the line from Thomson junction to Duluth.

It further appears that by act approved May 5th, 1864, the U. S. granted lands to the State of Wisconsin to aid in the construction of a railroad from Bayfield to Superior, but no road was constructed under this grant.

WINSLOW, *J.*:

The grant of a right of way across the public lands of the United States by the act of July 2nd, 1864, was a grant "*in presenti*," and took effect when the route was definitely fixed by relation as of the date of the act. St. Paul & P. Co. *v.* N. P. R'y Co., 139 U. S., 1. The route was definitely fixed across the petitioner's land before he made his entry thereof, and the controlling question is whether the eastern terminus of the Northern Pacific railroad was located at Duluth, Minnesota, or at Ashland, Wisconsin.

In the former case the company took no right of way over public lands in Wisconsin, and must now condemn and pay for the land in question; but in the latter case it is entitled to the right of way which it is using over the petitioner's land under its grant.

The act left the exact location of both termini of the proposed railway undetermined. It was to begin at a point on Lake Superior, in Minnesota or Wisconsin, and end at "some point" on Puget's sound; that this course was adopted in order to leave the question of the exact termini to the decision of the corporation itself cannot be doubted. The debate upon the bill in the House of Representatives clearly shows that this was the intention (see remarks of Mr. Sweat, Cong. Globe, first session, 38th Congress, p. 1699), and such was undoubtedly the legal effect of the lan-
204 guage used. When such discretion is vested in a corporation, its decision will not be interfered with, unless it has exceeded the limits of its discretion or bad faith in the selection is

shown. Fall River, etc., Co. *v.* R. R. Co., 5 Allen, 221; Parkes Appeal, 64 Pa. St., 137. Undoubtedly also, if the selection of a terminus be in fact once deliberately made, the power of choice is exhausted, and the determination is final. Pierce on Railroads, p. 254; State *v.* Norwalk, etc., Co., 10 Conn., 157; H. & D. C. Co. *v.* N. Y. & E. Co., 9 Paige, ch. 323.

It is claimed by the petitioner, and such was the decision of the trial court, that the Northern Pacific Company definitely located the eastern terminus at Duluth January 1st, 1872, when it purchased one-half of the track and right of way of the L. S. & M. railroad from Thomson junction to Duluth and made a contract for operation of the line in common. On the other hand, the appellant company claims that these transactions did not constitute a location or selection of the eastern terminus of the road, but that the line from Thomson junction to Duluth simply constituted a branch line as authorized and required by the laws of the State of Minnesota, and that the eastern terminus was not definitely located until the passage of the resolution of the board of directors of the N. P. R. R. Co., August 2nd, 1884, fixing the terminus of the road at Ashland, Wisconsin.

The petitioner's contention is based upon and fully supported by two decisions by the Secretary of the Interior, made respectively November 13th, 1895, and August 27th, 1896, and reported in 21 Land Decisions, p. 412, and 23 Land Decisions, p. 204. These decisions were rendered upon application by the N. P. R. R. Co. to select indemnity lands in North Dakota to make up for lands lost within the limits of its grant in Wisconsin. In the first of these decisions it was held that the company had no land grant east of Superior, because its eastern terminus was either at Duluth
205 or Superior, and in the second it was held that it had no land grant east of Thomson junction. The argument in support of these decisions is that the railroad company was only entitled to touch one point upon Lake Superior; that when it purchased the half interest in the L. S. & M. railroad track from Thomson junction to Duluth and began to operate it in connection with its main line to the west, such action constituted a consolidation or association with said latter company within the meaning of the act of incorporation, and, taken in connection with the actual operation of such line for ten years, definitely located the eastern terminus of the road at Duluth, whereby it exercised finally its right of selection of a terminus; that the subsequent filing of maps and resolutions showing an intention to fix the eastern terminus at or near Ashland was of no effect, because the right to select the eastern terminal had been exhausted, and that the approval of such maps and the acts of the department in withdrawing from sale lands in Wisconsin within the place limits, as well as the acceptance by the executive department of the road from Thomson junction to Ashland, could not be considered as adjudicating the terminal right, because after the terminal had been fixed no act of the Land Department or of the Executive could confer any right in the matter.

Notwithstanding the strength of the argument made by Secretary

Smith in these decisions, we find ourselves unable to agree with his position. The claim that the company was necessarily confined to a single point upon Lake Superior by the terms of its grant does not seem to us sound. This contention is based upon the opinion of Secretary Lamar in the matter of the Atlantic and Pacific Railroad Company, 4 L. D., 458, and upon the case of U. S. *v.* Southern Pacific R. R., 146 U. S., 570. In those cases a land grant was made to the company to aid in building a railroad to begin near Springfield, in Missouri, thence to the Colorado river, and "thence
206 west by the most practicable and eligible route to the Pacific."

The company filed maps of its route showing that it reached the Pacific at San Buenaventura and then extended northward along the coast three hundred and eighty miles and made San Francisco its terminus, claiming that its land grant extended to San Francisco. This claim was overruled by the Secretary and by the court on the ground that when the line reached the Pacific ocean at San Buenaventura that point became the western terminus. It had constructed a line "to the Pacific," and its grant went no further. This view seems reasonable in consideration of the terms of the act and the situation in that case. The road was to run "to the Pacific." The Pacific coast was nearly at right angles with the route of the road, and to hold that it might, after reaching the Pacific, turn northward out of its course and run several hundred miles along the coast to another port would be evidently not within the intention of the grant. In the present case, however, the line was to commence at a "point on Lake Superior," meaning, of course, a shipping point. Lake Superior lies with a long finger pointing westward; both of its coast lines are practically parallel with the necessary route of the proposed railroad. Now, it certainly could not have been contemplated that the railroad must start at the nearest or most westerly point on Lake Superior, because that would fix the terminus at Duluth and nowhere else and make it impossible to start in Wisconsin, and it was as certainly the purpose of the act to leave the "point" undetermined and to give the company a choice of shipping points at which to make their terminus either in Wisconsin or Minnesota. Had the company at once filed their maps showing Ashland as the eastern terminus and commenced the construction of their line westward from Ashland, we apprehend no one would have seriously claimed that they were outside of their charter rights, even if the road touched Su-
207 perior in its course westward. Having selected legitimately "a point" on Lake Superior, and one well calculated for their purpose, and not having gone out of their natural route to do so, what good reason could be given for saying that they have transcended their powers? Certainly the fact that they have touched at Superior and thus added to the commercial facilities of the public can hardly be a good reason for denying the power. The company, being entitled to start from any available point on Lake Superior in Wisconsin, had the right, it seems to us, to make Ashland that point, and then, having done so, its rights can hardly be curtailed by the fact that the shore of the lake runs parallel with its

necessary route, so that in proceeding westward its line naturally and almost unavoidably touches another harbor. So we do not consider that the company was in any way prevented from making Ashland its eastern terminus or from touching at Superior upon its route westward.

But it is said, and this is, perhaps, the most serious objection, that in 1872 the company made a practical selection of Duluth as its terminus by the purchase of a half interest in the L. S. & M. track from Thomson junction to Duluth and by operating the same thereafter with its own trains. The L. S. & M. was a land-grant railroad, and it is said that this purchase and the subsequent running agreements constitute a consolidation, confederation, or association of the two roads such as was contemplated and authorized by the third section of the act of incorporation, so that as matter of fact the road from Thomson junction to Duluth became a part of the trunk line contemplated by Congress, and it is said that unless it be so held the N. P. R. R. Co. had no authority or power to make such purchase or running arrangements. Certainly neither the purchase of one-half of the road-bed of the L. S. & M. Company nor the subsequent operation of the road-bed in common nor the leasing of the entire road constituted a consolidation of
208 the two corporations in any legal sense. Consolidation of two corporations properly may be said to take place when the shareholders of both form a new one and dissolve the former corporations. Morawetz on Private Corporations, sec. 939. It has been also held to include a case where one corporation is enlarged and survives, issuing stock to the stockholders of the other corporation, which is dissolved and becomes merged in the former. Meyer *v.* Johnson, 64 Ala., 656. But nothing of the kind happened in the present case. Both corporations maintained their separate corporate existence. They simply became owners in common of a short piece of road and made contracts with each other regulating its operation in common. It may be said that they associated themselves together, and in a certain sense this is true, but not in the sense contemplated by the act. The words "confederate and associate" are used in conjunction with the word "consolidate," and the familiar rule of "*noscitur a sociis*" plainly applies. Furthermore, the act says that this consolidation, confederation, or association is to be "upon the terms named in the first section of the act." The first section of the act creates the corporation, names the corporators, enumerates the corporate powers, provides for the first meeting of the corporation, names its officers and their duties, and provides for subscriptions for stock. These are the only "terms" named in the first section. It does not seem very clear what the words "upon the terms named in the first section" mean, but, if they mean anything, we think they must mean that the consolidation or association intended is one which results in a corporation combining the two corporations in one, thus satisfying the legal definition of consolidation, and not a mere owership and operation in common of a piece of track or a rental by one company to another of its road.

Moreover, a plain and adequate reason appears to have existed for

the purchase of an interest in the line from Thomson junc-
209 tion to Duluth entirely outside of the consolidation provision.

Section 18 of the act of the incorporation provided that the Northern Pacific R. R. Co. should obtain the consent of the legislature of any State through which any portion of its line might pass before commencing the construction thereof. By the act of the legislature of Minnesota approved March 2nd, 1865 (chap. 69, Sp'l Laws 1865), the consent was given, provided that if the eastern terminus of the road was fixed east of the State, then the N. P. R. R. Co. should construct or cause to be constructed a line from its main line to the navigable waters of Lake Superior within the State of Minnesota. It thus became necessary for the company to comply with the terms of the proviso, provided it fixed its eastern terminus in Wisconsin, and by its act of incorporation it was vested with all the powers and privileges necessary to carry into effect the purposes of the act. In August, 1870, it located its proposed general route and transmitted to the Interior Department a map of such location, showing its eastern terminus to be in Wisconsin, at the mouth of the Montreal river, which map was approved by the Secretary of the Interior. Thus the condition contemplated by the proviso came into being, and it was necessary to construct a line from its main line to some Minnesota port on Lake Superior. This could be substantially complied with by the purchase of an existing line, as well as by the construction of a new one, and we therefore conclude that the purchase of one-half of the track of the L. S. & M. R. R. from Thomson junction to Duluth was simply a compliance with the proviso placed upon the N. P. R. R. by the Minnesota legislature, and was not a location of the eastern terminus of the road.

The result of these conclusions seems necessarily to be fatal to the petitioner's case. One further claim should, however, be noticed.

On March 6th, 1865, one Josiah Perham, then president of
210 the Northern Pacific R. R. Co., filed with the Secretary of the Interior a map showing a proposed route of the proposed railroad. On this map there appear two lines from a point in North Dakota to Lake Superior, one ending at Duluth and one at the mouth of the Montreal river. This latter line is partially obliterated by a wavy red line through its whole length. It appears affirmatively that the president had no authority to make or file this map, and that the directors never authorized it, and, further, that on June 22nd, 1865, the map was rejected by the Land Commissioner and Secretary of the Interior because it did not comply with the rules and regulations of the Land Department. No further action was ever taken upon it, and it seems too plain to require argument that it can cut no figure in the case.

All the subsequent maps made and filed by the corporation, as well as its recorded acts, show the clear intention to make the eastern terminus of the road in Wisconsin. In 1870 a map of general route was filed, showing the eastern terminus to be at the mouth of the Montreal river, upon receipt of which the odd-numbered sections of land within twenty miles of the line were withdrawn from sale, homestead and pre-emption entry within the States of Minnesota

and Wisconsin, and the price of land in the even-numbered sections was raised to $2.50 per acre, and large quantities of land sold by the U. S. at that price. In 1882 a map of definite location of the line from Thomson junction eastward to a point in section 15, town 47, range 2 west of the 4th P. M., was filed in the Land Office at Washington. This line passed through Ashland and terminated a few miles east of that city. This map was approved, and the land grant adjusted in accordance therewith by the department. In August, 1884, the board of directors of the company, by formal resolution, fixed the eastern terminus of the road at Ashland, and a cer-
211 tified copy of the resolution was filed in the General Land Office in December, 1884; whereupon the Land Commissioner made a diagram showing the eastern terminus so fixed and adjusted the grant in accordance therewith.

The portion of the road extending eastward from Thomson junction to Ashland was constructed in the years 1881, 1882, 1883, and 1884, and was examined in three sections by commissioners appointed by the President of the United States, as provided by the act of incorporation. The commissioners reported favorably upon all of these sections, and their recommendations were approved by the President, the last approval being dated February 6th, 1885.

All of these deliberate acts of the department and executive officers are brushed aside by Commissioner Smith on the ground that the terminus of the road had been unalterably fixed at Duluth by the action of the Northern Pacific Company in 1872. As we do not agree with the Commissioner's premise, we cannot agree with his conclusion, and therefore hold that the terminus of the road is at Ashland, and hence that the railroad company had a right of way across the petitioner's land by virtue of the provisions of the act of incorporation.

By the COURT: Order reversed and cause remanded, with directions to dismiss the petition.

212 STATE OF WISCONSIN.

In the Supreme Court.

STATE OF WISCONSIN, *ss*:

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment-roll, and all of the proceedings had in the said supreme court of the State of Wisconsin in the suit between Andrew Doherty, plaintiff, against The Northern Pacific Railway Company, defendant, entitled in said court "In the matter of the petition of Andrew Doherty," including the opinion of said supreme court of the State of Wisconsin, as appears upon the original files and records of the said supreme court of the State of Wisconsin; and I do further certify and return that I have annexed to said transcript, and included therewith, and

that the foregoing are true and correct copies of the petition for a writ of error, bond on writ of error and approval thereof, assignments of error, and that the same remain on file and of record in said supreme court of the State of Wisconsin, and the original writ of error from the Supreme Court of the United States and the allowance thereof, and the original citation issued thereon, with proof of service thereof, and that the foregoing constitutes a true, full, and complete return of said writ of error.

In witness whereof I have hereunto set my hand and the seal of the said supreme court of the State of Wisconsin, at the capitol, at Madison, Wisconsin, on this 6th day of August, 1898.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of Supreme Court, State of Wisconsin.

Endorsed on cover: Case No. 16,965. Wisconsin supreme court. Term No., 121. Andrew Doherty, plaintiff in error, *vs.* The Northern Pacific Railway Company. Filed August 26th, 1898.

[redacted]

THE NORTHERN PACIFIC RAILWAY COMPANY,

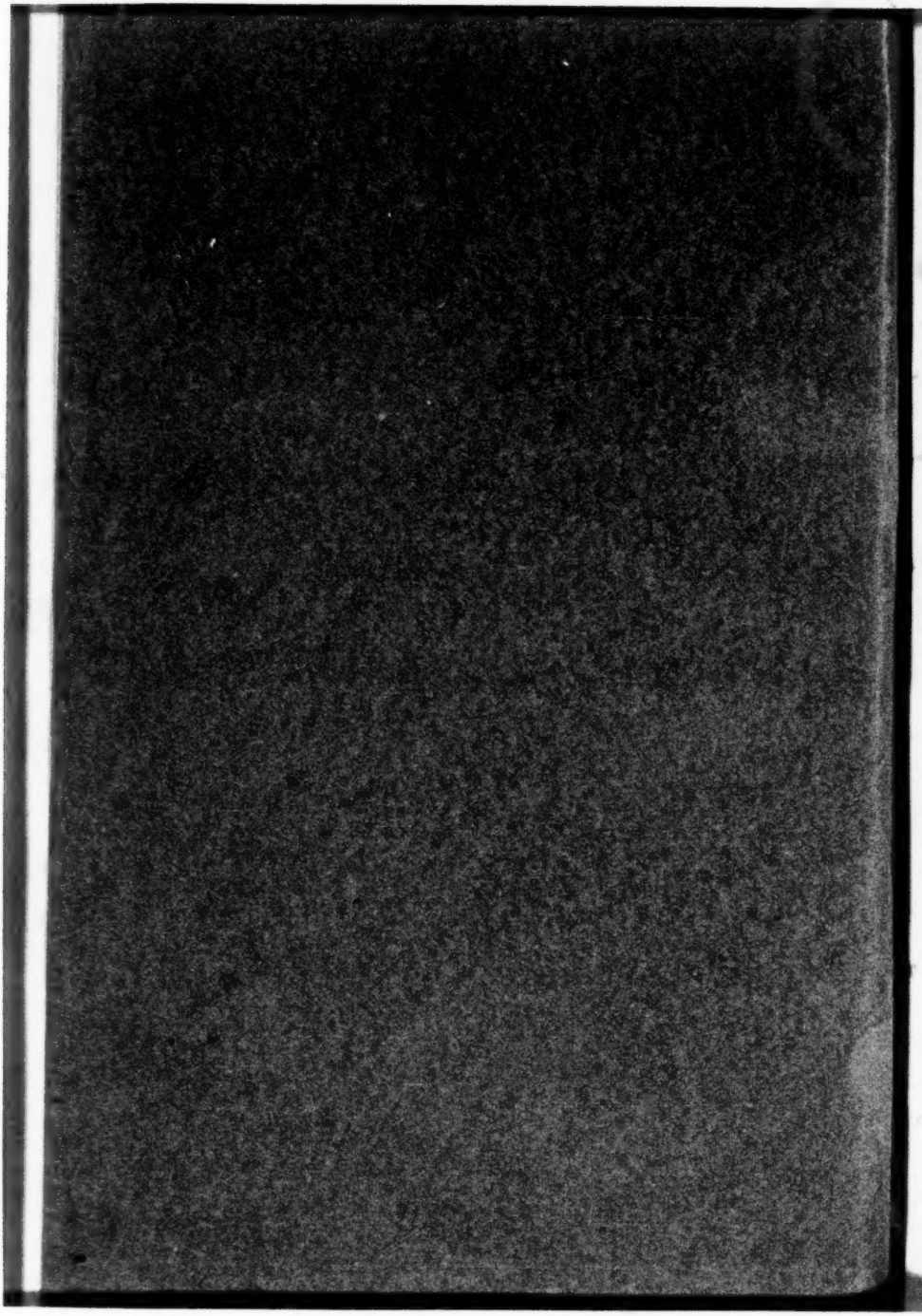
[redacted]

In Error to the Supreme Court of the State of Washington.

Brief of Plaintiff in Error.

[redacted]

CROSWELL & FOLEY and
M. B. BRIGHT,
Attorneys for Plaintiff in Error.



(16,965)

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1899.

No. 121.

ANDREW DOHERTY,

Plaintiff in Error.

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

Brief of Plaintiff in Error.

CROWNHART & FOLEY AND
M. S. BRIGHT,
Attorneys for Plaintiff in Error.

STATEMENT.

This proceeding was instituted in the Superior Court of Douglas County, Wisconsin, by the filing of the petition of Andrew Doherty, the plaintiff in error, which alleged that he was the owner in fee of the north-half of the south-west quarter of section four, township forty-seven north, range eleven west, in Douglas County, Wisconsin.

The petition further alleged that in the year 1883 the Northern Pacific Railroad Company entered upon the land of the petitioner, constructed across said land its railroad, and continued to occupy the portion so appropriated for railroad purposes until August 31, 1896, when said railroad was sold and transferred to the defendant in error the Northern Pacific Railway Company, which last named company thereafter occupied the premises so taken.

The petition further alleged that neither company had acquired title to the premises so taken, and that no proceeding had been instituted by either company to acquire title by purchase, eminent domain or otherwise. It was prayed that petitioner be adjudged to be the owner of the land so taken, and that commissioners be appointed to assess his damages.

To this petition the Northern Pacific Railway Company interposed an answer asserting title to the premises in controversy in itself by virtue of a grant by act

of congress of July 2, 1864, to the Northern Pacific Railroad Company, and a purchase of the interest of the last named company.

Upon the pleadings the sole issue between the parties was that of title, and it was conceded that this question depended on the location of the eastern terminus of the Northern Pacific Railway Company under the act of Congress of July 2, 1864. The Northern Pacific Railroad Company claims that the eastern terminus or point of beginning was established at the City of Ashland, on Lake Superior, and that the right of way over the land in question was granted by Congress, while the plaintiff in error claims that the eastern terminus of the road under the act of Congress was fixed at Duluth, or if not at Duluth, then at Superior, and that the Northern Pacific Railroad Company constructed that portion of its main line east of those points without authority under its charter.

The trial court determined this question in favor of the plaintiff in error, and upon appeal to the Supreme Court of the State of Wisconsin, the order of the lower court was reversed with directions to dismiss the petition of plaintiff in error. To reverse such decree of the Supreme Court this cause is brought to the United States Supreme Court on writ of error.

The trial was had upon an agreed statement of facts which is incorporated in the bill of exceptions, and from which the following facts appear:

On November 8, 1882, the petitioner, Andrew Doherty, filed his application in the proper United

States District Land Office to make homestead entry of the north half (N. ½) of the southwest (S. W. ¼) of section four (4), township forty-seven (47), range eleven (11), which includes the land in controversy, and on the same day his application was allowed.

Thereafter, having complied in all respects with the laws relating to homesteads, and on February 6, 189-, the patent of the United States was issued to him purporting to convey the land so entered.

The title of the Northern Pacific Railroad Company, under which the appellant company claims, was asserted under an act of congress approved July 2, 1864, entitled: "An act granting lands to aid in the construction of a railraad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route," which is set out at length in the bill of exceptions.

Transcript of Record, pp. 26 to 35.

It is provided by the first section of this act as follows:

"And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin: thence westerly by the most eligible route as shall be determined by said company, within the territory of the United States, on a line north of the forty-

fifth degree of latitude, to some point on Puget's Sound. * * *"

And it is provided by Section 2:

"And be it further enacted that the right of way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed. * * *"

By Section 3 of the act of July 2, 1864, lands were granted to aid in the construction of the proposed railroad to the amount of ten alternate sections per mile on each side of the line within the states, and twenty alternate sections in the territories, with a right of indemnity for lands excepted from the grant within ten miles of the limits of such alternate sections.

By the joint resolution of congress of May 31, 1870, a further indemnity belt ten miles in width, on each side of the line, was created, from which the company was entitled to satisfy losses occurring after the date of the grant which could not be satisfied within the first indemnity limits of the state or territory wherein they occurred.

Transcript of Record, p. 35.

The act required an acceptance of its terms by the company within two years from its approval, and this was done December 29, 1864.

Transcript of Record, p. 35.

Section 18 of the granting act required the company to obtain the consent of the legislatures of the several states through which the road should pass previous to commencing the construction thereof, and in the year 1865 the legislatures of Minnesota and Wisconsin gave such consent.

Transcript of Record, pp. 37-38.

The act passed by the Minnesota legislature is in part as follows:

Sec. 1. That the consent of the state be and the same is hereby given to the said Northern Pacific Railroad company to survey, lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances within its limits, on the line in said act of congress authorized; and for the purposes aforesaid in said act of congress set forth, and in order to carry the same to full effect, the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities, within the limits of this state, which are by said act of congress conferred upon them within the territories and jurisdiction of the United States, subject to the conditions in said act contained, and the following proviso:

"Provided, that should the said company elect to make the eastern terminus of said road east of the eastern boundary of the State of Minnesota, then, and in that case, they shall construct, or cause to be con-

structed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the State of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights and privileges are hereby granted to said company as they have or may have to construct said main line within the State of Minnesota; and provided, further, that nothing in this act contained shall be construed as exempting the roadbed and other property of said company within this state from taxation."

Sec. 3 of the act of July 2, 1864, which authorized the building of the Northern Pacific Railroad and made the land grant, contained the following provisions:

"That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount of land granted by this act:

"Provided, further, thatthe railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company or may consolidate, confederate and associate with said company upon the terms named in the first section of this act."

By the act of May 5, 1864, (13 Stat. 64,) Congress had granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from St. Paul to the head of Lake Superior, five alternate sections per mile on each side of that railroad. The State of Minnesota transferred this grant to the Lake Superior & Mis-

issippi Railroad Company, and that company constructed the railroad from St. Paul to Duluth by way of Thompson, where the Northern Pacific Railroad subsequently crossed it. On May 5, 1864, Congress granted to the State of Wisconsin to aid in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, to Bayfield, and thence to Superior, every alternate section of land for 10 sections in width on each side of the railroad. 13 Stat. 67. This grant was transferred by the State of Wisconsin to the Portage, Winnebago & Superior Railroad Company which filed its map of definite location on November 10, 1869, and thereupon the lands within the limits of the grant were withdrawn from settlement and entry, and so remained until after the Northern Pacific Railroad Company filed its map of definite location of July 6, 1882. That portion of this railroad from Bayfield to Superior never was built, but it was on the same general route as a portion of the road of the Northern Pacific Railroad Company from Thompson to Ashland.

The actual building of the Northern Pacific Railroad was commenced in the year 1870, at Thompson Junction, on the line of the Lake Superior & Mississippi Railroad, in the State of Minnesota, and said road built westward therefrom.

On the 1st day of January, 1872, the Lake Superior and Mississippi Railroad Company deeded to the Northern Pacific Railroad Company an undivided half interest in all of its property from Thompson Junction

to Duluth for the sum of five hundred thousand dollars. (Transcript of record p. 58.)

On the same day, the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company entered into an agreement for the joint management and control by the two companies of the road jointly owned by them from Thompson Junction to Duluth. (Transcript of record p. 64.)

On May 1st, 1872, the Northern Pacific Railroad Company leased from the Lake Superior and Mississippi Railroad Company the entire line of the latter road for a period of 999 years. (Transcript of Record p. 71.)

On the 21st day of April, 1874, the two companies entered into an agreement in writing by which the lease of the entire line of the Lake Superior and Mississippi Railroad to the Northern Pacific Railroad Company above referred to was annulled. (Transcript of record p. 89.)

In 1872 the line of road had been located and built from western Dakota as far as Thompson, in the State of Minnesota, a place on the Lake Superior and Mississippi railroad, about twenty-six miles from Duluth. For ten years no more building was done at the eastern end of the line. In 1882 the road was constructed from Thompson to the City of Superior, at the eastern extremity of Lake Superior, viz: on the the Bay of Superior. Two years later it was built across petitioner's land, and a short time thereafter in 1884, was built to Ashland, Wisconsin.

By the eighth section of the granting act, it was

provided as one of the conditions of the grant, that the whole road should be completed by July 4, 1876. This limitation was extended for a period of two years by an Act of Congress, May 7, 1866. (14, Stat. 355.)

ASSIGNMENTS OF ERROR.

I.

The court erred in its judgment that the petition of plaintiff in error be dismissed.

II.

The court erred in its judgment, wherein and whereby it decided that the plaintiff in error was not the owner of the land in controversy, and was not entitled to receive compensation for the taking thereof by the defendant in error.

III.

The court erred in its judgment, wherein and whereby it decided that the patent of the United States issued to the plaintiff in error upon his homestead entry under Section 2289 of the Revised Statutes of the United States did not convey to the plaintiff in error the land in controversy.

IV.

The court erred in its judgment, wherein and whereby it held that the defendant in error had a right

to use and occupy the land in controversy under the act of Congress of July 2nd, 1864, paramount to the right of the plaintiff in error under his said patent.

ARGUMENT.

The plaintiff in error contends:

First: That the eastern terminus of the Northern Pacific Railroad Company was fixed at Duluth, Minnesota, by virtue of a consolidation with the Lake Superior & Mississippi Railroad Company in 1872.

Second: That if the terminus was not fixed at Duluth by reason of such consolidation, then such terminus was fixed at Superior, Wisconsin, by the act of the Northern Pacific Railroad Company, in locating and building its line of road to said place in 1882.

We will consider the propositions in the order stated.

By the granting act to the Pacific Railroad Company, two ways were provided in which a line of railway might be secured from "a point on Lake Superior to some point on Puget Sound," viz. (1) the Northern Pacific Railroad Company might construct its own road upon the entire line. (2) If said route should be found upon the line of another and prior land grant railroad route, as far as the two routes were upon the same general line (that is as far as the general line or

route selected was common to both roads) the company receiving the previous grant might assign its interest to the Northern Pacific Railroad Company, or might "consolidate, confederate and associate" with such company for the construction and operation of the road along such common route. Westward from Thompson's Junction in Minnesota, the Northern Pacific constructed its own line. The question now is, was the arrangement effected between said company and the agreement set forth in the record, especially the agreement and contract of purchase of January 1st, 1872, such a consolidation, confederation or association of the two roads as was contemplated by the granting act to the Northern Pacific Railroad Company? If it was, then Duluth must be the eastern terminus of the road as it is on Lake Superior and the road was to be built to but one point on the lake. We will discuss fully this last statement under the second head.

Let us see what are the facts as to the consolidation: On November 30th, 1871, the Northern Pacific Railroad Company filed its first map of definite location. The road as located by that map started at the point of its junction with the Lake Superior & Mississippi Railroad at Thompson, and extended westward to the Red River of the North, at Fargo, North Dakota.

By act of May 5th, 1864, (13 Stat. 64) Congress had made a land grant to the State of Minnesota, for the purpose of aiding in the construction of a railroad in said state from the City of St. Paul to the Head of Lake Superior. The Lake Superior & Mississippi

Railroad Company became the grantee of the State of Minnesota under that act and had constructed the road in aid of which the grant was made prior to the time of the filing by the Northern Pacific Railroad Company of its said map of definite location. Before this, however, and on March 6th, 18 5, the so-called "Perham Map" was filed by the president of the Northern Pacific Railroad Company. On the map was designated the general route of the whole line of road from Lake Superior to Puget Sound and showing the head of the lake, Duluth or Superior, as the starting or initial point.

Whether this filing was authorized or not, this much is to be seen by said map: If Duluth were to be made the initial point of the road, then from Duluth westward to Thompson in Minnesota the routes of the Lake Superior & Mississippi Railroad and the Northern Pacific Railroad were on the same general line.

Such was the situation then up to January 1st, 1872, when the Lake Superior & Mississippi Railroad Company sold to the Northern Pacific Railroad Company, a one-half interest in, and the right to jointly use and operate that portion of the former company's main line between Thompson's Junction in Minnesota and the City of Duluth on Lake Superior in said state. The consideration for the sale was the sum of $500,000, which was to be paid by the said Northern Pacific Railroad Company on the 1st of January, 1896, if the premises on that date should be unencumbered of certain existing mortgages, or as soon thereafter as they should become free from said mortgages. And until

said sum of $500,000 should become due and payable, the said Northern Pacific Railroad Company was to pay semi-annually the sum of $17,500 to be applied to the payment of interest on certain mortgage bonds of the Lake Superior & Mississippi Company and certain taxes against the same. Provision was made for the joint occupation, use and operation of the road by both companies; and at the same time a deed was made and executed by the Lake Superior & Mississippi Company conveying to the Northern Pacific Railroad Company an undivided one-half interest in all that portion of the said grantor's said main line of railway between Thompson's Junction and Duluth, on Lake Superior, and all and singular the appurtenances thereunto belonging, in accordance with the terms of said agreement.

By the arrangement, the Northern Pacific Railroad Company was enabled to connect and did connect its road with Lake Superior, at Duluth, Minnesota, from Thompson's Junction, in said state, a distance of 26 miles, over the line of a railroad to aid in the construction of which, lands had been previously granted by the United States (13 Stat. 64). In determining what was the purpose of making said arrangements and agreements with the said Lake Superior & Mississippi Railroad Company, some very suggestive language is to be found in the agreement for the purchase of one-half interest in said company's road made January 1st, 187?, executed by the president and secretary of the Northern Pacific Railroad Company. The language is found on

page 103, 104 of Transcript of Record and is in part as follows:

"The party of the first part is the owner of a certain line of railroad, known as the Lake Superior & Mississippi Railroad, which extends from the City of St. Paul in the State of Minnesota to the City of Duluth, in the same state, and which, entering the city of Duluth runs to a grain elevator erected upon a dock on the margin of the Waters of Lake Superior, including a passenger and freight depot and numerous side tracks within the city.

"And, whereas, the said party of the second part (Northern Pacific Railroad Company) is duly authorized by law to construct, or to acquire, and to maintain and operate a certain railroad which *if constructed as an independent line, would run into and through Duluth aforesaid, and to the waters of Lake Superior aforesaid, and to terminate at a point adjacent to the terminus of the said Lake Superior & Mississippi Railroad.*

"And, whereas, the railroad of the said party of the second part, commonly known as the Northern Pacific Railroad, as the same is now located and constructed, connects with the said Lake Superior & Mississippi Railroad near the Town Thompson, in Carleton County, in the said state of Minnesota, but has not been constructed into the said City of Duluth; and the said party of the second part has heretofore by agreement with the said party of the first, done its transportation between the said point of connection of said roads and

the water of Lake Superior, over and by the way of the said Lake Superior & Mississippi Railroad.

"And whereas, the said party of the second part, being desirous of permanently securing the right to use the portion of said railroad, which extends from the said points of connection of said roads, into Duluth. as aforesaid, *to the end that the necessity for construction of the said Northern Pacific Railway from the said point of connection to the said city of Duluth may be obviated* has agreed to purchase an undivided one-half interest in such portion of the said Lake Superior & Mississippi Railroad for the price or sum, etc., and the said party of the first part has agreed to sell and convey the same to the said party of the second part, and to grant certain easements and rights of way over and in connection therewith."

And again, in the agreement between the same parties made May 1st, 1872, the following language is found on page 77 of Transcript of Record: "And whereas, "it is believed by the parties hereto to be for their mu- "tual interest that the said Northern Pacific Railroad "and the said Lake Superior & Mississippi Railroad "should be operated under one and the same manage- "ment and control."

Now, from the facts it would appear, as found by the Secretary of the Interior (23 L. D. 210.)

(1). That the routes of the two roads were found to be upon the same general line between Thompson's Junction and Lake Superior.

(2). That by said agreement and contract of purchase, the Northern Pacific Company became the abso-

lute owner of the one-half interest of the main line of railroad between these two points, which had been constructed by the Lake Superior & Mississippi Company under a previous congressional land grant.

(3). That by said agreement, running arrangements were formed and entered into, and the two companies became associated together in the ownership, use and operation of said main line railroad between said points.

(4). That the Northern Pacific Company thus effected the connection of its own constructed road with Lake Superior, the eastern terminal limit of its grant.

(5). And, that said company continued thus for nearly fourteen years (and the arrangement still continues) and until after the time limited by the grant for the completion of its road had elapsed, to use and operate the line of road it had thus acquired, in all respects as though it were a part of its own main line of road from Lake Superior to Puget Sound, required to be constructed by its grant.

"In view of these facts it is difficult to arrive at any other conclusion than that the said arrangement was a consolidation, confederation and association of the two roads, such as it was the intention of Congress to provide for. The circumstances which led up to the contract of association and the results accomplished by it, seem to have been, in all respects, just such as were contemplated by Congress, when it adopted the said two provisos. The routes of the two land grant roads were found to be upon the same general line between the

points named, and by means of the said association and confederation the two railroad companies were enabled, together to aid, and did aid, to that extent, in the accomplishment of the object of the grant, namely, the construction of a "continuous railroad" from Lake Superior to Puget's Sound." (23 L. D. 210, 211.)

The Northern Pacific Railroad Company had no power or authority to enter in any such arrangement with another road, except such power as is conferred by its granting act. It is contended that such power is given by act of the Minnesota Legislature of March 2, 1865,(Transcript of Record p.37) which act provided that in case said Northern Pacific Company should elect to make the eastern termination of its road east of the State of Minnesota the said company "shall construct or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the State of Minnesota."

Certainly the legislature did not intend by this, that in case the Northern Pacific Company located its eastern terminus in Wisconsin, that such provision or condition might be complied with by merely entering into some running arrangement with some road to the lake, whose line was crossed by the Northern Pacific Company, and it is equally clear that the grant of power to "construct or cause to be constructed" a line of railway to the waters of Lake Superior does not contain or carry with it or imply power to consolidate with some line already in operation.

Pearsall vs. Great Northern Ry., 161 U. S., 664.

The powers of corporations organized under legislative statutes are only such as those statutes confer.

Thomas vs. Railroad Co., 101 U. S., 71-82.

Power to consolidate is not implied, but must be expressly given in the charter.

2 Morawetz, Sec. 941-1.
Cook on Stock and Stockholders, Sec. 668.

In this case, the granting act authorized the Northern Pacific Company to "consolidate, confederate and associate" with any other and prior land grant road so far as the routes of the two roads were found to be on the same general line, upon the terms named in the first section, that is, for the construction of a "continuous railroad," from Lake Superior to Puget's Sound; and no authority was given for such consolidation, confederation or association upon any other terms.

Thompson vs. Railroad Co., 101 U. S., 71.

It would seem then, that the Northern Pacific Railroad Company had no power or authority to effect the arrangement it did effect with the Lake Superior & Mississippi Company,— whether it be called a consolidation, confederation or an association of the two com-

panies, except upon the terms prescribed in the granting act and it will not be presumed that the company undertook to violate the terms of its charter, or, on the other hand, to do a vain thing. Besides, the language of the deed or agreement of January 1st, 1872, is to the effect that the Northern Pacific road *when completed* was to "terminate in Duluth, Minnesota, at a point on the waters of Lake Superior, adjacent to the terminus of the said Lake Superior & Mississippi Railroad, indicating, it seems to us, that it was then the intention of the Northern Pacific Company to make Duluth the eastern terminus of the road.

Again, by the terms of the granting act it was made one of the conditions thereof, that the entire line of road be completed by July 4th, 1876. By the act of 1866, hereinbefore referred to, this time was extended for a period of two years, or to July 4th, 1878. At the termination of the period within which the road should have been built, no location of any part of the road had been made farther east than Thompson's Junction in Minnesota, and the Northern Pacific Railroad made connection with Lake Superior, its statutory eastern terminus, only over the Lake Superior & Mississippi Railroad from said Junction to Duluth in the manner hereinbefore stated. For four years after the expiration of the time limited in said grant for the completion of said road, nothing was done toward building a line from Thompson to the lake. It is hardly conceivable that the company would have subjected this grant to forfeiture through such neglect. The irresistible con

clusion is that the company then considered that the terms of its grant had been complied with in this particular, by its consolidation with the Lake Superior & Mississippi Railroad.

. Or, as stated by the Secretary of the Interior (21 L. D. 419). "By consolidation, confederation or association with another land grant railroad company, 'upon the terms named in the first section of the granting act,' that is, to make a 'continuous' railroad from Lake Superior to Puget's Sound, the Northern Pacific had complied with the terms of its charter."

"If no other cannection with Lake Superior had ever been attempted or made, and steps had been taken to forfeit the grant because of the failure to build a "continuous" road from "a point on Lake Superior," etc., it cannot be doubted that the fact of its connection with the Lake, as above stated would have been held to be a full compliance with the granting act and a complete and successful answer to any contention otherwise."

"It would seem therefore, that the company having made connection in this wise with "a point on Lake Superior, within the term required by law, it cannot now be heard to said that it did not do so; or be allowed to change its mind and establish another point as its initial point."

SECOND.

If the eastern terminus of the road was not fixed at Duluth, Minnesota, by the consolidation with the Lake

Superior & Mississippi Railroad in 1872, then it was fixed at Superior, Wisconsin in 1882, by locating and building its line to "a point" on Lake Superior at that place.

Sometime prior to April 17, 1882, the line of road was constructed from Thompson's Junction to Superior, Wisconsin. This piece of road, consisting of about twenty-five miles, was examined by commissioners appointed by the President of the United States, as provided by the granting act of July 2, 1864. Said commissioners examined said road and reported that it was constructed in compliance with the terms of said act of 1864, and on the 14th day of September, 1882, the Secretary of the Interior, transmitted said report to the President of the United States, with a recommendation that said report be approved and said road accepted by the President, according to the terms of the said granting act of July 2, the recommendations of the Secretary were approved by the President. (Transcript of Record p. 51.)

Two years elapsed before anything further was done, when on August 24, 1884, more than two years after the construction of the road to Superior City, at the western end of Lake Superior, the board of directors of the Northern Pacific Company, formally fixed upon Ashland as the initial point of road. Thereafter, the road was constructed between Ashland and Superior and a map of construction thereof filed January 20, 1885.

Superior or Superior City, was the first point at

which the Northern Pacific Railroad Company connected with Lake Superior by its own road, and it thereby became the initial point contemplated by the granting act.

In fixing a terminus and building its line to Lake Superior the Northern Pacific Railroad Company had no rights other than those contained in the granting act and the terms of the act are to be construed most strongly against the Company.

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Fertilizing Company vs. Hyde Park, 97 U. S., 659.

Therefore, the right of the Northern Pacific Company, after having once affected a connection of its road with Lake Superior either by the consolidation and association with the Lake Superior & Mississippi road at Duluth or by building its own line to Superior City, to affect another and different connection under the grant, with said lake does not exist unless such right is given by the grant in clear and unambiguous terms.

Authority was given to the Northern Pacific Com-

pany to establish but one point or terminus on Lake Superior. On this point the language of Congress is plain and unambiguous. It says: "A point on Lake Superior, not "points." Here, then, is no room for construction or misconstruction, but plainly one place and one point is meant, and nothing more. For, surely, the right to construct from "a point on Lake Superior" cannot be construed as authorizing the company to lay out its road skirting for miles along the shore of the Lake, so as practically to monopolize the use of the waters and harbors thereof and the land adjacent thereto.

Prosser vs. Northern Pacific Railroad Co.,
152 U. S., 59-64.

When the location of the road to Superior City was filed and the road constructed to that point, the terms of the granting act had been fully complied with, in respect to building to "a point on Lake Superior" and the power of the company to fix another initial point was gone.

It is well settled that where authority is given a chartered company to do an act, that power is exhausted when once exercised, unless it clearly appears that it was intended the exercise thereof was to be continuous.

East Tennessee Railway Co. vs. Frazier,
139 U. S., 288.

The rule seems to be without exception that where

authority to locate a railroad is given to a company, when that location is made, the power is exhausted, and the company cannot thereafter change that location at will.

Delaware Canal Co. vs. Erie Ry. Co., 9 Paige, 328.

State vs. Norwalk Etc. Co, 10 Com. Rep.

Mason vs Brooklyn R. R. Co., 35 Barber 374.

People vs. New York & Hudson Ry. Co., 45 Barb., 73.

Van Wyck vs. Knevals, 106 U. S. 366.

Pierce on Railroads, 254-5.

And as said by Secretary Smith in 21 L. D. 421: "It is beyond credence that congress ever contemplated that after having once made the connection (with Lake Superior, at Superior City) the Northern Pacific Company should be allowed subsequently to enlarge its land grant, by skirting along the lake to other points farther east. The terms of the act were gratified when the road was constructed between a point on Lake Superior to Puget's Sound, and farther east the grant could not be extended, nor could that point be changed to another without legislative sanction."

Notwithstanding the distinction which counsel attempts to make between the case of the Atlantic & Pacific Railroad Company, (4 L. D. 458) and this case, we think the former decision is directly in point on the

claim that when a connection with Lake Superior was once affected, the right to establish an eastern terminus was exhausted and no action by the Railroad company in filing maps or building road further east, or any action of the department in accepting the same, would operate to change the terminus.

The facts in that case are as follows: By act of Congress of July 27th, 1866 (14 Stat. at Large, 292) lands were granted to this company to aid in building a railroad upon a route defined by the act as follows:

"Beginning at or near the town of Springfield in the State of Missouri, thence to the western boundary line of said state, and thence, by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river, thence to the town of Albuquerque on the river del Norte, and thence by way of the Agua Frio, or other suitable pass, to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence, by the most practicable and eligible route, to the Pacific."

In 1872, 1873 and 1874 maps of definite location of sections of the route were filed which carried the definite location of the line to San Buenaventura, on the Pacific Ocean, and two other maps which carried the line northward 380 miles to San Francisco. These maps were approved, but no portion of the road from San Buenaventura to San Francisco was ever built.

We quote from the opinion by Secretary Lamar, on page 460:

"The language of the grant is: 'To the Colorado River at such point as may be determined by the company for crossing, thence by the most practicable and eligible route to the Pacific.'

"While this legislation leaves the company, with the approval of the Secretary of the Interior, to determine what is a practicable and eligible railroad route to the Pacific, it makes the Pacific, when reached, the terminus of the road; and when the Pacific was reached by a route which was selected by the company and approved by the secretary, the terminus was reached and it was beyond the power of either or both to extend the road about three hundred and eighty miles beyond the terminus fixed by law, and increase the grant of lands by the government to that extent. The same assumption of power which could justify the extending of the line in this case, after the ocean was reached could have carried it to the northern line of Washington Territory, or the southern line of California, which was certainly not the intent of the act of 1866. Hence, as there was no power in the officers of the government to thus extend the grant, after the legal terminus of the road had been reached at the Pacific Ocean, the acceptance of the maps of definite location between the points described in the rule, was without power and void."

This language would seem to be as applicable to the present case as though written concerning it.

If after the line has been located and constructed to a point on Lake Superior at Superior City, the Company can with the consent of the Interior Department extend its line and its grant along the shore of the lake seventy miles to Ashland then "the same assumption of power" could have carried it and can still carry it along the southern shore of the lake, to the boundary line of Wisconsin and Michigan and along the northern shore of the lake to the boundary line of Minnesota and Canada, which certainly was not the intent of the act of July 2, 1864.

It is stipulated in this case, that the act of Congress of May 5th, 1864, (13 Stat. 66) may be considered in evidence, and it is well to note the provisions of that statute and the proceeding under it as having relation more or less to, and somewhat explanatory of the subsequent action and present claims of the Northern Pacific Company. By Section 3, of said act, a grant of land was made to the State of Wisconsin to aid in the construction of a railroad from Portage City to Bayfield, and thence to Superior City, on Lake Superior. The entire line of this road was definitely located November 9, 1869; said location running from Portage City northwardly through Ashland to Bayfield, thence westerly to Superior City. This road, now known as the Wisconsin Central, was subsequently built from Portage to Ashland; but has not been built beyond. Between Bayfield and Superior City, the line of road, as definitely located, is about upon the same general line as the sub-

sequent definite location of the Northern Pacific Railroad between Superior and Ashland.

As the Wisconsin grant was the older by two months, if the road thereunder had been built, it would have been entitled to all the odd numbered sections within the lapping limits of the two roads, to the exclusion of the Northern Pacific. And in addition to this "so far as the routes are upon the same general line," the amount of land granted to the Wisconsin Central would in the language of the proviso to the third section of the Northern Pacific act, "be deducted from the amount granted" to that Company.

Thus the Northern Pacific would not have received any of the granted lands within the common limits, nor have been entitled to idemnity for the same; as obviously, Congress did not intend to make two land grants for roads along "the same general line."

"It is thus seen that on May 5th, 1864, Congress made a grant to Wisconsin in aid of the construction for a railroad from Ashland to Superior; and it is hardly credible that within a month thereafter, Congress made or intended to make another and larger grant to another road to secure practically the same object. Indeed, this antecedent legislation, and other considerations, strongly impress me with the belief that it was in the mind of Congress that the Northern Pacific Railroad should start from a point at the western end of Lake Superior, either in Minnesota or Wisconsin, and from nowhere else; as this would certainly be the most direct route between the termini. When it became apparent

that the Wisconsin Central did not intend to build its road farther than Ashland, the Northern Pacific's management seems to have again changed its mind and determined to reach out for a further extension to its line and grant to the eastward; its obvious purpose being to make connection with the Wisconsin Central at Ashland." (21 L. D. 412.)

MAPS.

On March 6th, 1865, Josiah Perham transmitted to the land department, what is known as the Perham Map. It is true, this map was not accepted by the department, but it is among the files and shows what must have been the intention of the Northern Pacific Company with reference to locating the eastern terminus of its road, just as clearly as though such map had been accepted. This map is an exhibit in this case as "Petitioner's Exhibit 1," and no extended description of it is necessary here. The map shows two lines running from a point in Dakota about one hundred miles west of Minnesota, one of said lines extending across Minnesota and Wisconsin to the mouth of the Montreal River, the other extending eastward to the head of Lake Superior, where a line drawn would seem to indicate an intention to locate the line in both Duluth and Superior City. Across the first mentioned line, a wavy line of erasure is drawn, indicating, if the map indicates anything, an abandonment of any proposed location of

the eastern terminus at the mouth of the Montreal River in Wisconsin, and selecting the head of the lake as the starting point. Of course, it is contended, that this map shows an alteration which must be explained before the map is admissible in evidence, and while the rule requiring explanation of patent alteration of instruments offered in evidence, is probably as contended by defendant in error, still this rule cannot overcome the presumption that the records of a public office are correct, and in this case, the presumption must obtain that the records and files of the Interior Department are the same as they were when originally made.

Further, it is claimed that the president of the Northern Pacific Company had no authority to file such map.

It will be seen from the letter of President Perham, accompanying said map, to the Secretary of the Interior, that the president states that such map is filed "under authority of the Board of Directors of the Northern Pacific Railroad Company."

There being no proof that all the actions of the said Board of Directors are contained in the minutes of the secretary of said Company, or that all the minutes are in existence, it seems to us it must be presumed that the statement in the president's letter, that he acted under the authority of the Board of Directors in filing said map is true, and that such filing was authorized.

In 1867 another map was filed by the Company. Across its face is drawn a line along the route of the road from Lake Superior to Puget's Sound, with two

initial points, one starting at Bayfield on Lake Superior in Wisconsin; the other at Superior City on Lake Superior near the western boundary of Wisconsin, both points being west of the Montreal River.

Here seems to be evidence of an abandonment of the former selection of Duluth, as the starting point and the selection of two initial points on the lake in Wisconsin In 1870 another map was filed on which the two lines of the map of 1867 from Superior City and Bayfield, and the line from Duluth and Superior City shown on the map of 1865, are both abandoned, and a single line starts from the mouth of the Montreal River, the most eastern point in Wisconsin, and runs nearly due west, crossing the Lake Superior & Mississippi Railroad at Thompson's Junction.

On this same map, or on another map filed the same day, the line in Washington Territory skirted Puget's Sound for more than two hundred miles, ending only when the international boundary was reached.

In November 1871, a map of definite location was filed, extending from Fargo to Thompson's Junction. Afterwards a map of construction of this portion of the line was filed, showing connection of the road with Duluth, as through a continuation of the same general line of route.

On July 5th, 1882, the company filed a map of definite location eastward from Thompson's Junction in Minnesota, to Bad River, Sec. 15, Township 47, Range 2, West in Wisconsin, a point about twelve miles east of

Ashland, but west of the Montreal River and *not* on Lake Superior.

Other maps were filed at different times, but the above are enough to show that while during all these years the Railway Company was assiduously filing maps and changing the eastern terminus, such action does not show that the Northern Pacific Company had any fixed or continued purpose to establish an initial point on Lake Superior at any particular place.

The Railway Company claims that "the acceptance *of the map of definite location vested the right of way and is conclusive.*"

The map was approved by the secretary not earlier than November 22nd, 1882.

Prior to April 17th, 1882, the line of road had been constructed to a point on Lake Superior at Superior City, Wisconsin, was examined by commissioners duly appointed and accepted by the President of the United States, September 16th, 1882, upon recommendation of the Secretary of the Interior. (Transcript of Record pp. 50–51.)

Now, when the line of road had been built to a point on Lake Superior at Superior City, and the same had been accepted by commissioners duly appointed in accordance with the terms of the act of July 2nd, 1864, and the report approved by the Department of the Interior and the Executive, the terms of the grant had been complied with, the terminus of the road had been established and it was simply beyond and without the power

of the Railroad company or the secretary or the president to extend the grant or change the terminus. Their acts in attempting to do so were without color of authority and were void. We have precisely the same principle of law here, as in the case of the Atlantic & Pacific (4 L. D., 458.) There, the secretary accepted the maps of definite location westward to the Pacific Ocean at San Buenaventura and thence north along the coast to San Francisco. It was contended in that case that such action was conclusive; that, in other words, the matter was *res adjudicata*.

On this point, Secretary Lamar said:

"The principle only exists when the tribunal which renders the decision has jurisdiction of or power over the subject decided. As the only power to approve maps of definite location in this case is conferred by the act of 1866 and that power only extended to the Pacific Ocean, when that terminus was reached the power was exhausted and the approval of all beyond was in excess of the authority of the departmental officers and could have no greater obligatory legal force than should have been accorded to like actions, by any other person who was not an officer of the department."

The same matter was before the Supreme Court of the United States, in The United States vs. Southern Pacific Railroad, 146 U. S., 570, where the decision of Secretary Lamar was approved in the following language:

"Subsequently, and when Mr. Justice Lamar was Secretary of the Interior, the matter was re-examined, and it was properly held that under the act of 1866, the grant to the Atlantic & Pacific was exhausted when its line reached the Pacific Ocean. San Buenaventura was, therefore, held to be the western terminus and the location of the line approved to that point.

"The fact that its line was located, and maps filed thereof in sections, is immaterial."

Defendant in error relies upon the case of Noble vs. Union River Logging Company, 147 U. S., 162, as being decisive ofthe point in question, but the difference between the cases would seem clear.

In the Noble case the statute provided:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the law of any state or territory," etc.

The sole question for Secretary Vilas to determine was whether the Union Logging Company was one entitled to the benefit of such grant. The court held that he had full jurisdiction and authority to render such decision, and having made it, the department had no power to annul it

In the case at bar, the right of the department to approve a point selected by the Northern Pacific Company, as an eastern terminus, is limited by the provis-

ions of the granting act. These are plain and unambiguous.

The act says the eastern terminus shall be "a point" on Lake Superior, not any number of points.

Now, then, in 1882, the Northern Pacific Company built its road to "a point" on Lake Superior at Superior City; the same was accepted by the Secretary and President and thereupon at least, if not before, the power terminated, of the company to locate or establish any other terminus, and of the department to approve of such terminus.

The Northern Pacific Company made its connection with Lake Superior by constructing and operating its line to Superior City, and a formal declaration to that effect or to the contrary could make no difference in the fact; and having made Superior City such terminus, it was beyond the power of the company to locate another eastern terminus, and if that be so, then, certainly the department was entirely without jurisdiction when approving such terminus.

Of course, our first contention is that the eastern terminus of the road was established at Duluth in 1872 by consolidation, confederation or association with the Superior & Mississippi Railway, and if this be so, then at that time the right of the company to establish an eastern terminus was ended, and the department was thereafter without power or jurisdiction to approve any other location of a terminal point on Lake Superior.

Is the United States estopped to deny a location to Ashland?

The Northern Pacific Railway Company contends that the United States is estopped to deny a location to Ashland, and relies upon the case of United States vs. Willamette Valley, etc., Wagon Road Company. 54 Fed. Rep 807. The language of the court in this very case should seem to be a complete answer to the claim made here:

"Where the government has acted by legislative enactment, resolution or grant, or otherwise than by the unauthorized or illegal acts of its agents; and the parties dealing with the government have relied upon the same and in good faith have so changed their relations to the subject matter thereof, that it would be unequitable to declare such action or grant illegal, the government will be estopped."

The situation in this case is that the location to Ashland in 1884, and the approval thereof was not a "legislative enactment," resolution or "grant," but was an "unauthorized" act of the Northern Pacific Company and the department.

The same question was raised before Secretary Lamar in the case of the Atlantic & Pacific Railroad, 4 Land Decisions, p. 460. Among other things the secretary says:

"To the claim that the line included in the rule has

been mortgaged and money raised on its credit, it is a sufficient reply that the mortgagees could have a lien upon no greater title than the mortgagor, and if through negligence or mistake they took a mortgage upon that to which the mortgagor had no legal claim, and which reasonable diligence in the examination of the title would have shown them, the misfortune is their own and should not be borne by the nation."

In the case at bar the company's charter was the measure of its right and its provisions were disregarded and its grant exceeded with full knowledge on the part of the company of all the facts.

In the language of Secretary Smith (23 L. D., 212) "It is scarcely conceivable that Congress can ever have designed that the grant company, when it had once made its connection with Lake Superior within the terms and conditions prescribed, should afterwards be allowed to form other connections and finally designate and establish the one most advantageous to its interests and which would secure to it the largest amount of lands under its grant; or that it should be allowed to use and operate such first connections as a compliance, to that extent, with the terms of the grant, and afterwards waive such compliance and establish another connection; or that it was contemplated that the company could, under its grant, establish more than one principal point of trade and transhipment on Lake Superior."

"No such powers are given in express terms, and I do not think they are fairly inferable from any reasonable construction of the grant. And the company could

not establish such rights, or confer such powers upon itself, by resolution of its Board of Directors, or otherwise." (23 L. D., 212.)

This is a fair statement of the situation existing at the time the company was extending its line to Ashland and of which it had full cognizance. It ought not to be heard now to plead an estoppel.

For the above and foregoing reasons it is contended that the decision of the Supreme Court of the State of Wisconsin, is erroneous and should be in all things reversed.

Respectfully submitted,

CROWNHART & FOLEY AND
M. S. BRIGHT,
Attorneys for Plaintiff in Error

No. 191.

ANTHONY DOHERTY,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Defendant in Error.

No. 468.

UNITED STATES OF AMERICA,

Appellant,

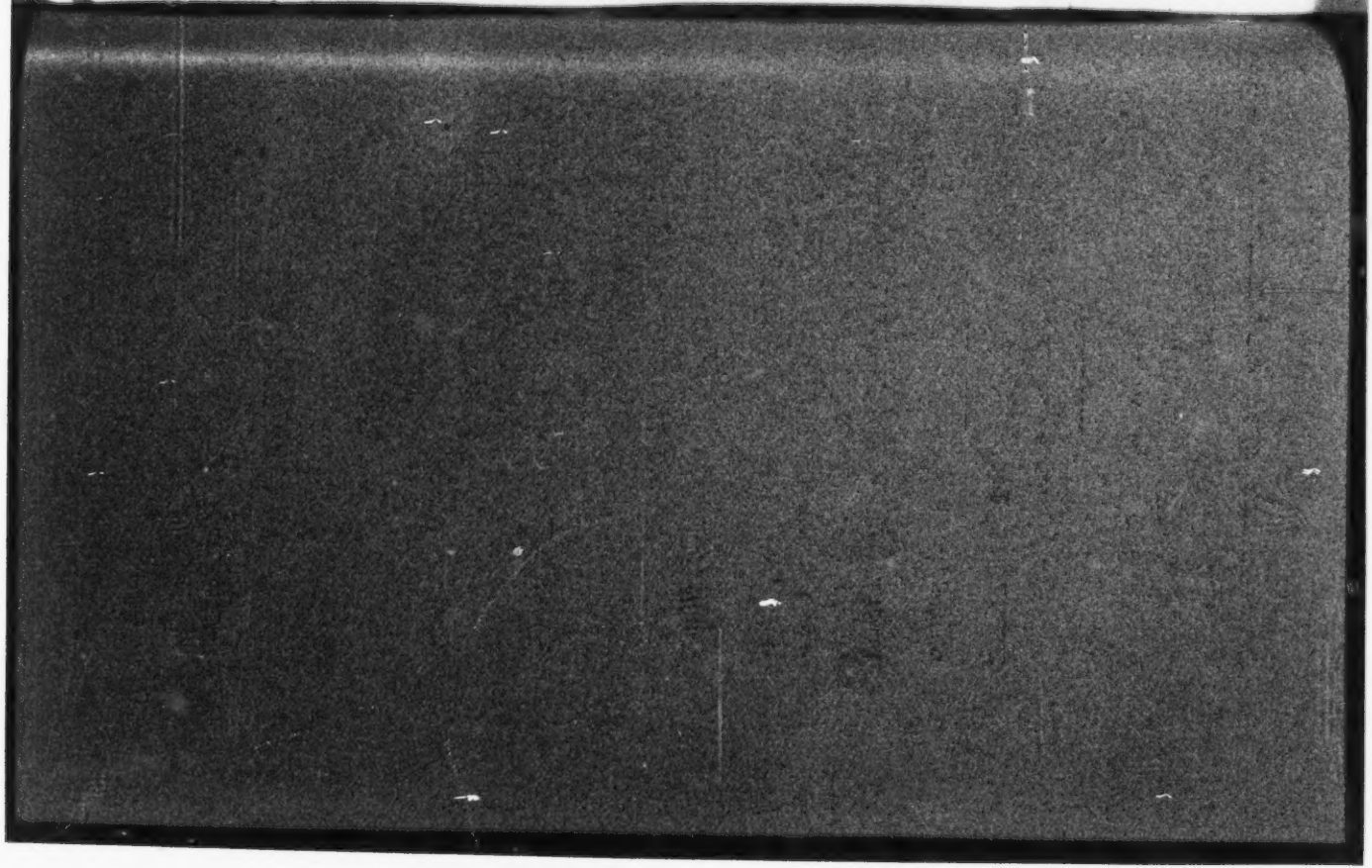
vs.

NORTHERN PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, and EDWIN H. McHENRY and FRANK G. BICKLOW, as receivers of the Northern Pacific Railroad Company,

Appellees.

ARGUMENT FOR DEFENDANT IN ERROR AND APPELLEES.

C. W. BUNN and
JAMES B. KERR,
Counsel for Defendant in Error and Appellees.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 121.

ANDREW DOHERTY,
Plaintiff in Error.

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error.

No. 408.

UNITED STATES OF AMERICA,
Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, and EDWIN H. MCHENRY and FRANK G. BIGELOW, as receivers of the Northern Pacific Railroad Company,
Appellees.

ARGUMENT FOR DEFENDANT IN ERROR AND APPELLEES.

STATEMENT.

The two cases above entitled depend upon substantially the same facts and involve the same

question. The court directed that they be heard, in argument, as one case. The same brief is, therefore, presented in both cases.

The Doherty case is before the court on a writ of error directed to the supreme court of Wisconsin. The opinion is printed in the transcript pp. 105-114, and reported in 100 Wis. p. 39. It involves the title of the defendant in error to a piece of its right of way between Superior and Ashland, Wisconsin.

The United States case is before the court on the appeal of the United States from a judgment of the circuit court of appeals for the eighth circuit affirming a judgment of the circuit court for the district of Minnesota dismissing a bill in equity filed by the United States to set aside a patent to the Northern Pacific Railroad Company, on the ground that the land conveyed by the patent was outside the limits of the Northern Pacific grant. The land involved lies in Minnesota and was patented by the United States to the company on account of its line between Superior and Ashland. The opinion of the circuit court is printed in the transcript pp. 161-166, and the opinion of the court of appeals is printed in the transcript pp. 161-166, and reported in 95 Fed. Rep. p. 864.

Both cases were heard upon agreed statements of fact and the question is presented: where is the eastern terminus of the Northern Pacific Railroad? It is contended by both Doherty and the United States that the terminus was fixed at Duluth, or if not at Duluth, then at Superior City, Wisconsin. It is contended by the defendant in error and ap-

pellees that the terminus was fixed at Ashland, Wisconsin. Reference will be made to the record in the Doherty case as "Case No. 121, transcipt p ------," and in the United States case as "Case No. 408, transcript p-----."

The facts upon which the question of the location of the terminus depends are as follows:

The Northern Pacific Railroad Company was created by act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route." (13 *Stat. at Large*, 365.)

It is provided by the first section of this act as follows:

> "And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound. * * *"

By section 3 of the act of July 2, 1864, lands were granted to aid in the construction of the proposed railroad to the amount of ten alternate sections per mile on each side of the line within the states, and twenty alternate sections in the territories, with a right of indemnity for lands excepted from the grant within ten miles of the limits of

such alternate sections. (Case No. 121, transcript p. 29; Case No. 408, transcript p. 114.)

By the joint resolution of congress of May 31, 1870, a further indemnity belt ten miles in width, on each side of the line, was created, from which the compny was entitled to satisfy losses occurring after the date of the grant which could not be satisfied within the first indemnity limits of the state or territory wherein they occurred. (Case No. 121, transcript p. 35; Case No. 408, transcript p. 118.)

The act required an acceptance of its terms and impositions by the company within two years from its approval, and this was given December 29, 1864. (Case No. 121, transcript p. 35; Case No. 408, transcript p. 118.)

Section 18 of the granting act required the company to obtain the consent of the legislatures of the several states through which the road should pass previous to commencing the construction thereof, and in the year 1865 the legislatures of Minnesota and Wisconsin gave such consent. (Case No. 121, transcript pp. 36-38; Case No. 408, transcript pp. 118-123.)

In 1870, the company located the general route of its railroad from the mouth of the Montreal River, in Wisconsin, a point about thirty miles east of Ashland, across the states of Wisconsin and Minnesota, to a point on the Red River of the North, near Fargo, on the boundary between Minnesota and the then territory of Dakota. A map showing this location of the general route was, on August 13, 1870, transmitted by the company to

the secretary of the interior. (Case No. 121, transcript p. 39; Case No. 408, pp. 123-4.)

Copies of this map are before the court marked "Exhibit 1," in case No. 121, and "Exhibit 4," in case No. 408.

Upon receipt of this map, and on August 13, 1870, the secretary transmitted it to the commissioner of the general land office, with instructions to withdraw from sale, homestead and pre-emption, all odd-numbered sections of land within twenty miles of the line so designated within the states of Wisconsin and Minnesota. (Case No. 121, transcript p. 39; Case No. 408, transcript p. 124.)

Thereupon, the commissioner of the general land office withdrew the odd sections within twenty miles of the line of general route in Wisconsin and increased in price to $2.50 per acre all even numbered sections of public land within those limits. (Case No. 121, transcript p. 40; Case No. 408, transcript p. 125.)

Thereafter, whenever cash payment was required by law in the disposition of any of said even-numbered sections, the district officers demanded payment therefor at the rate of $2.50 per acre, and the United States disposed of large quantities of land so situated, and received payment therefor at the rate of $2.50 per acre. (Case No. 121, transcript p. 40; Case No. 408, transcript p. 125.)

In the year 1882 the chief engineer of the Northern Pacific Railroad Company prepared a map showing the proposed line of the definite location of said railroad from a point on the St. Paul & Du-

luth Railroad (formerly the Lake Superior & Mississippi Railroad) in section one (1), twonship forty-eight (48), north of range seventeen (17), west of the fourth principal meridian, Minnesota (now known as Thomson Junction), easterly to a point in section fifteen (15), township forty-seven (47) north, of range two (2) west of the fourth principal meridian, Wisconsin, and, on May 9, 1882, the executive committee of the board of directors, duly authorized so to do, adopted the following resolution:

> "The chief engineer, having made and forwarded a map or plat of that part of the company's main line of railroad which extends from a point on said main line in section 1, of township 48 north, of range 17 west of the fourth principal meridian, in the state of Minnesota, to the crossing of Bad river to section 15 of township 47 north, range 2, west of said meridian, in the state of Wisconsin, duly verified by his affidavit on the 17th day of April, 1882, whereon is indicated by a red line the said definite location, and the same being carefully considered, it was, on motion of Mr. Harris:
>
> "Resolved, That the said map or plat be, and the same is hereby approved; and the line of the Northern Pacific Railroad as above described is hereby definitely fixed on, and according to the said red line indicated and laid down on said map. And the president of the company is requested to certify the said plat and cause it to be filed in the office of the commissioner of the general land office." (Case No. 121, transcript p. 41; Case No. 408, transcript p. 125-6.)

This map was, accordingly, duly certified by the officers of the company and verified by the chief

engineer, and transmitted by the president of the company to the secretary of the interior for filing in the office of the commissioner of the general land office. (Case No. 121, transcript p. 41-43; Case No. 408, transcript p. 127.)

Copies of this map are before the court marked "Exhibit 2" in case No. 121, and "Exhibit 6" in case No. 408.

This map of definite location was thereupon, and on July 6, 1882, duly transmitted to the commissioner of the general land office by the secretary of the interior, and thereafter, and on November 22, 1882, the secretary instructed the commissioner to adjust the grant to the Northern Pacific Railroad Company in accordance with the maps of definite location, including the map just mentioned, in so far as the railroad had been constructed. (Case No. 121, transcript pp. 43-44; Case No. 408, transcript pp. 128-129.)

Thereupon the commissioner of the general land office prepared a diagram showing twenty, thirty and forty mile limits on each side of said line of definite location, extending eastward from Thomson Junction as far as the road had then been constructed, a distance of twenty-five miles. These limits were respectively the limits of the lands in place, the indemnity belt created by the act of July 2, 1864, and the additional, or second, indemnity belt created by the joint resolution of May 31, 1870. This diagram the commissioner transmitted to the district land officers at Bayfield, Wisconsin, on January 5, 1883, together with a letter of in-

structions directing them to withhold from sale, pre-emption and homestead all the odd-numbered sections within the designated limits, and as before, upon the location of the general route, to hold all even-numbered sections within twenty miles of the line at a minimum price of $2.50 per acre. (Case No. 121, transcript pp. 44-45; Case No. 408, transcript pp. 129-130.)

On May 17, 1883, the secretary of the interior further instructed the commissioner to withdraw all odd-numbered sections of land within thirty miles of said line of definite location, without reference to the construction of the road, and the commissioner, on June 22, 1883, took action similar to that taken by him on January 5, 1883, and extended the withdrawal of lands within the thirty-mile limits the full length of said line of definite location. (Case No. 121, transcript pp. 45-46; Case No. 408, transcript pp. 131-132.)

On October 8, 1883, the secretary directed the commissioner to extend the withdrawal to the forty-mile or second indemnity limits, the full length of the definite location in Wisconsin, and in accordance with these instructions the commissioner so directed the local officers at Bayfield. (Case No. 121, transcript pp. 46-47; Case No. 408, transcript pp. 132-133.)

The board of directors of the Northern Pacific Railroad Company, on August 20, 1884, adopted the following resolution:

> "Resolved, That the eastern terminus, or point of beginning of the Northern Pacific Railroad on Lake Superior be and the same is

> hereby fixed, determined and established at a point at the city of Ashland, on Lake Superior, in the county of Ashland, in the state of Wisconsin, in section 27, township 48 north, of range 4 west of the fourth principal meridian."

A copy of this resolution, duly certified, was transmitted to the commissioner of the general land office on December 3, 1884. (Case No. 121, transcript p. 47; Case No. 408, transcript pp. 133-134.)

Thereafter, the commissioner of the general land office prepared a diagram showing the final eastern terminal of said line as fixed by the above resolution, and on February 3, 1887, transmitted the same to the district officers at Bayfield, Wisconsin, together with a letter of instructions, wherein he recites the filing of the maps of general route and definite location, and the fixing of the eastern terminal at Ashland, and directs the adjustment of the grant on the basis of the location and terminal so fixed. (Case No. 121, transcript pp. 48-49; Case No. 408, transcript pp. 134-135.)

Copies of this diagram are before the court marked "Exhibit 3" in case No. 121, and "Exhibit 7" in case No. 408.

The point at Ashland so fixed as the terminus is substantially on the line of definite location as defined by the map of July 6, 1882, but about twelve miles west of the most easterly point shown on that map. A spur of about a mile in length leaves this line at a point in the city of Ashland, and by this means actual contact with the waters of Lake Superior is effected.

The road was constructed eastward from Thomson Junction to Ashland, and westward from Thomson to a point fifty-five miles west of Helena, Montana, and was constructed eastward from Wallula Junction, in the territory of Washington, a point east of the Cascade Mountains, to said point fifty-five miles west of Helena, and these portions of the line were united at the last mentioned point in August, 1883. During the years 1885, 1886 and 1887 the company constructed its road from a point on the line about sixteen miles north of Wallula Junction over the Cascade Mountains to Tacoma, on Puget's Sound. (Case No. 121, transcript p. 49; Case No. 408, transcript pp. 135-136.)

The portion of the road extending eastward from Thomson Junction to Ashland was constructed on the line of definite location, as shown by the map of 1882, in the years 1881, 1882, 1883 and 1884, and was examined in three sections by commissioners appointed by the president of the United States, as provided by section 4 of the act of July 2, 1864. (Case No. 121, transcript p. 50; Case No. 408, transcript p. 136.)

The first of these three sections extended from Thomson Junction to Bluff Creek, a point within the corporate limits of Superior City, a distance of twenty-five miles, and was constructed in 1881 and 1882. The commissioners appointed to examine the same duly reported that this section was constructed in compliance with the act of congress of July 2, 1864, and this report was transmitted to the president by the secretary of the interior, with

a recommendation that the report be accepted and that patents be issued for lands earned by its construction. These recommendations were approved by President Arthur, Sept. 16, 1882. (Case No. 121, transcript pp. 50-51; Case No. 408, transcript pp. 137-138.)

The second section of twenty-five miles of road, extending from Bluff Creek to the Brule River, was constructed in the latter part of the year 1883. This section was in like manner examined by commissioners, reported favorably, its acceptance recommended by the secretary, and the report approved by the president, January 31, 1884. (Case No. 121, transcript pp. 51-52; Case No. 408, transcript pp. 138-139.)

The third section, extending from the Brule river to Ashland, a distance of thirty-seven and one-half miles, was constructed in 1884, and was duly examined by commissioners, who reported in favor of its acceptance. This report, on the recommendation of the secretary of the interior, was approved by the president February 6, 1885. (Case No. 121, transcript pp. 52-53; Case No. 408, transcript pp. 139-140).

As part of the case of Doherty and of the United States, the following facts are stipulated:

That the map or plat marked "Exhibit A" in case No. 121, and "Exhibit I" in Case No. 408, is a true and correct copy of a certain map or plat now in the office of the commissioner of the general land office, which said map or plat was transmitted by Josiah Perham, president of the Northern Pacific

Railroad Company, to the secretary of the interior on March 6, 1865, together with a letter in which it was stated that the map or plat showed the general line of the Northern Pacific Railroad from a point on Lake Superior, *in the State of Wisconsin,* to a point on Puget Sound. (Case No. 121, transcript p. 53; Case No. 408, transcript p. 103).

This map shows upon its face, as indicated on the copy, two lines; one starting at the mouth of the Montreal river in Wisconsin and extending over and across the states of Wisconsin and Minnesota and traversing a portion of the territory of Dakota; the other line, commencing at or near Duluth, and extending across the state of Minnesota to a point in the territory of Dakota, where the two lines converge, and thence a single line extending to Puget Sound. The line starting at the mouth of the Montreal river is erased by a wavy line drawn over it.

Upon receipt of this map, the secretary of the interior transmitted the same, together with the letter of President Perham, to the commissioner of the general land office, and in a communication addresssed to that officer, suggested a withdrawal of the lands along the line indicated on the map in Minnesota and *Wisconsin.* (Case No. 121, transcript p. 54; Case No. 408, transcript pp. 104-105).

Upon the receipt by the commissioner of the general land office of this map, he addressed a communication to the secretary of the interior, in which he recommended that the map be rejected for the reason that it did not comply with the rules of

the land department. (Case No. 121, transcript p. 101; Case No. 408, transcript pp. 105-107).

In the Doherty case it is stipulated that the secretary of the interior approved the recommendation of the commissioner by endorsement on his letter (transcript p. 101), but in the United States case it is stipulated that there is endorsed on the letter of the commissioner the words "Sec'y sustains comm's refusal," (transcript p. 108) and that except as above stated, the department of the interior has never taken any action under or relative to said map, or made any withdrawal of lands thereunder. (Case No. 408, transcript p. 109).

The minutes of the board of directors of the Northern Pacific Railroad Company from December 7, 1864, the date of the first meeting of said board, up to the 18th day of May, 1865, show no action by said board with reference to locating the line of the Northern Pacific Railroad, and said minutes do not show any action conferring special authority upon the president of the company to locate said line. (Case No. 121, transcript p. 100; Case No. 408, transcript p. 108).

The powers of the president as conferred by the by-laws, are set out and are confined to presiding at meetings of the board of directors and exercising a general supervision over the affairs of the company. (Case No. 121, transcript p. 100; Case No. 408, transcript pp. 109-110).

By an act approved May 5, 1864, entitled "An Act making a grant of lands to the state of Minnesota to aid in the construction of the railroad from

St. Paul to Lake Superior," congress made a grant of ten sections of land per mile to aid in the construction of the road named in the title. This grant was duly conferred by legislation of the state of Minnesota upon the Lake Superior & Mississippi Railroad Company, a corporation created under the laws of that state, afterward known as the St. Paul & Duluth Railroad Company. (Case No. 121, transcript pp. 55-57; Case No. 408, transcript pp. 102-103).

By an agreement entered into on the 9th day of July, A. D. 1870, between the Northern Pacific Railroad Company, the Lake Superior & Mississippi Railroad Company, the Western Land Association and the Lake Superior & Puget Sound Company, it was agreed that the Northern Pacific Railroad Company should so connect its road with that of the Lake Superior & Mississippi Company at or near the Dalles of the St. Louis river as to open direct communication by rail with the town of Duluth, and should enter into running arrangements with the Lake Superior & Mississippi Railroad Company on terms that should be just and equitable to accomplish that object, and that the Northern Pacific Railroad Company should make its first connection east from the point of intersection with the Lake Superior & Mississippi Railroad Company by way of the line of the said last mentioned company over Rice's or Minnesota Point, and that it would not build any other road so as to form a connection running eastward of the Lake Superior & Mississippi Railroad north of Wyoming previous

to the completion of its road to the Missouri river. (Case No. 408, transcript pp. 11-16).

This agreement does not appear in the Doherty case.

On November 21, 1871, the Northern Pacific Railroad Company filed a map of definite location of that portion of its road extending from Thomson Junction in the state of Minnesota, westward a distance of two hundred and twenty-eight and two-tenths miles, to Fargo, on the Red River of the North, on the eastern boundary of the territory of Dakota. (Case No. 408, transcript p. 110).

The letters of transmittal from the railroad company to the secretary of the interior, and from the secretary of the interior to the commissioner of the general land office, which were filed with this map, and the map itself, show that the eastern point indicated thereon is Thomson Junction and not Duluth, as was intimated in the brief of the government in the court of appeals. (Case No. 408, transcript pp. 157-158). The map is "Exhibit 2" in case No. 408, but does not appear in the Doherty case.

On January 1, 1872, the Lake Superior & Mississippi Railroad Company had constructed and was operating a railroad from St. Paul to Duluth by way of the village of Thomson, and on that day the Northern Pacific Railroad company purchased a half interest in that portion of the road extending from Thomson to Duluth, a distance of twenty-six miles, for a consideration of five hundred thousand dollars. (Case No. 121, transcript pp. 58-63; Case No. 408, transcript p. 111, pp. 17-24).

On the same day, January 1, 1872, the two companies entered into an agreement in writing for the operation of the portion of the road in which the Northern Pacific Company had acquired a half interest. (Case No. 121, transcript pp. 64-70; Case No. 408, transcript p. 111, pp. 25-33). This agreement has to do with the operating of trains and the maintainance of the road. It provides for a schedule of trains and for rules and regulations for the running of trains, to be agreed upon between the superintendents of the two companies.

On May 1, 1872, the Northern Pacific Company and the Lake Superior & Mississippi Company entered into a further agreement, by the terms of which the Lake Superior & Mississippi Company leased to the Northern Pacific its line extending from St. Paul to Duluth, and assigned to the last named company its interest under three certain leases executed to it by the Stillwater and St. Paul, the Minneapolis & Duluth and Minneapolis and St. Louis Railroad Companies, of their respective lines of railroad then under construction. By the terms of the agreement the Northern Pacific Company agreed to pay as annual rental for the lines of road a sum equal to thirty per centum of the gross earnings thereof, except that portion from Thomson to Duluth where the Northern Pacific was allowed the benefit of its half ownership. The land grant of the Lake Superior & Mississippi Company is expressly excepted from the operation of the lease. (Case No. 121, transcript pp. 71-89; Case No. 408, transcript p. 111, pp. 34-57).

On the 21st day of April, 1874, the Northern Pacific Railroad Company surrendered all rights conferred by the lease of May 1, 1872, by executing a formal relinquishment of all its interest under the lease and assignments. (Case No. 121, transcript pp. 89-97; Case No. 408, transcript pp. 141-149).

The Northern Pacific Railroad Company operated the line of railroad extending from Thomson Junction to Duluth, a distance of about twenty-six miles, in which the Northern Pacific Company acquired a half interest by deed of conveyance of January 1, 1872, for a period of about fourteen years, to-wit, from the first day of January, 1872, to about the first day of January, 1886. The line was then abandoned by the Northern Pacific Company, and has since been unused. (Case No. 408, transcript p. 149).

In the United States case it further appears that in the month of February, 1873, the directors of the Northern Pacific Railroad Company were informed that claim was made by the officers of the Lake Superior & Mississippi Railroad Company that the effect of that certain deed of conveyance of January 1, 1872, whereby the Lake Superior & Mississippi Company conveyed to the Northern Pacific Company a half interest in that portion of its road extending from Thomson Junction to Duluth, was to fix the eastern terminus of the Northern Pacific Railroad at Duluth, and thereupon by resolution duly adopted on the 13th day of February, 1873, the directors of the Northern Pacific Company called upon the Lake Superior & Mississippi Company for

an agreement construing the agreement of January 1, 1872, so that the same should not be held to intend or have intended to fix the eastern terminus of the Northern Pacific Railroad at Duluth; and thereafter and on the 2nd day of June, 1873, the Lake Superior & Mississippi Railroad Company, by resolution of its board of directors, duly adopted, agreed with the Northern Pacific Railroad Company that said agreement of January 1, 1872, should not be held to intend or have intended that the eastern terminus of the Northern Pacific Railroad should be, or was, by virtue of said agreement of January 1, 1872, established at Duluth. (Case No. 408, transcript pp. 140-141).

The record in this case also shows that the Northern Pacific Railroad Company has never claimed to be entitled to receive any lands from the United States on account of said line of railroad extending from Thomson Junction to Duluth, and it has never received any lands whatsoever on account of that line. (Case No. 408, transcript p. 149).

It has been claimed by the government that the title to more than a million acres of land will be determined by this suit. It appears, however, that there are within the place limits of the grant east of Thomson Junction, only eight sections or 5,120 acres of land, which are subject to the grant; and in the indemnity limits, only 52,546 acres. (Case No. 408, transcript p. 152.)

It is true that if the lands were to be found within the indemnity limits west of Thomson

Junction, the company would be entitled to select a large quantity in lieu of the losses from the place limits between Thomson and Ashland, but there is an ascertained deficiency in the indemnity limits, which will render it impossible for the company to satisfy any portion of these losses. See certificate of the commissioner of the general land office, reported to the senate, and printed as Senate Document 150, Vol. 5 of Senate Documents, 54th Congress, second session.

The facts peculiar to the Doherty case are as follows:

The proceeding was instituted by the filing of a petition by Doherty in the superior court for Douglas county, Wisconsin, in which he alleged that he was the owner of the north half of the southwest quarter (N½ S W ¼) of section four (4), township forty-seven (47), north, of range eleven (11) west, situated in Douglas county, and that the Northern Pacific Railroad Company had entered upon and constructed its road over and across said premises without authority. It was further alleged that the Northern Pacific Railway Company had succeeded to the rights of the Northern Pacific Railroad Company, and was operating the road so constructed. The petition prayed that Doherty be adjudged the owner of the land so appropriated and that commissioners be appointed under the Wisconsin statute to assess the damages of the petitioner.

To this peition the Northern Pacific Railway Company interposed an answer asserting title by

virtue of the grant of right of way by Section 2 of the act of congress of July 2, 1864, to the Northern Pacific Railroad Company and a purchase of the interest of the last named company.

It appeared that on November 8, 1882, Doherty made homestead entry of the land in question and thereafter made the proof required by law of five years' residence and cultivation, and on February 6, 1890, a patent was issued to him for the land covered by his entry. (Case No. 121, transcript pp. 24-25).

The land was public land on July 2, 1864, and in December, 1883, the Northern Pacific Railroad Company constructed its road across the land and continued to occupy it for railroad purposes until August 31, 1896, when the Northern Pacific Railway Company succeeded by purchase to its rights and has since operated the road. (Case No. 121, transcript p. 25).

The land lies east of Superior City and the portion occupied for railroad purposes is on the line of definits location as shown by the map filed July 6, 1882. (Case No. 121, transcript p. 50).

It is conceded that if the eastern terminus of the road was lawfully fixed at Ashland, the title of the company under its grant of right of way relates back to July 2, 1864, under the decision of this court in Railroad Company vs. Baldwin, 103 U. S. 426, and Doherty's rights under his patent are subject to the earlier grant.

Both the circuit court of appeals and the supreme court of Wisconsin held that the terminus of the road was established at Ashland.

ARGUMENT.

It is clear that if it shall be held that the terminus or point of beginning of the Northern Pacific Railroad was lawfully fixed at Ashland, the judgments of the lower courts must be affirmed.

The claim that the eastern terminus was not established at Ashland is founded on two decisions of the secretary of the interior, overruling the long settled construction of the department upon the question.

The first of these decisions was rendered Nov. 13, 1895, and is reported in volume 21 of Land Decisions, at page 412. The second of these decisions was rendered Aug. 27, 1896, and is reported in volume 23 of Land Decisions, at page 204.

The first of these decisions was rendered by the secretary upon the consideration of a list of indemnity selections, filed by the Northern Pacific Railroad Company, based on losses of lands within the place limits lying east of Superior. The opinion reviews the action taken by the company for the purpose of locating its line, and finally concludes that because the company was empowered to locate and construct a line of railroad from a point on Lake Superior to some point on Puget Sound, it had authority to touch the lake at only one point, and although the company did all things in its power to establish its point of beginning at Ashland, and filed a single map of definite location from Thomson Junction to Ashland, the fact that the line so located and constructed touched the lake

at Superior precluded the company from extending its line eastward from that point. The decision holds that the power of the company was exhausted in this respect when its line once touched the lake. The secretary also strongly inclines in this opinion to the view that the Northern Pacific Company effected a consolidation, confederation and association with the Lake Superior and Mississippi Railroad Company by acquiring a half interest in that company's line from Thomson to Duluth, and thereby fixed its eastern terminus at Duluth. This question, however, was left open for future consideration.

By the decision of the secretary of Aug. 27, 1896, it was held that such a consolidation had been effected, and that Duluth must be considered the terminus of the road.

A preliminary question which was urged upon the court of appeals will be first considered and the two decisions by the secretary of the interior will be examined.

I.

Was the Power to Locate and Construct the Road Between Thomson Junction and Ashland Forfeited by Lapse of Time?

It is contended that the grant of lands to the Northern Pacific Railroad Company east of Thomson Junction lapsed and was absolutely forfeited

by reason of the fact that the portion of the line contemplated by the act, extending from Thomson Junction to Ashland, was not definitely located and constructed within the time specified by section 8 of the act of July 2, 1864, and the acts amendatory thereof.

It is understood that this claim of forfeiture of the land grant is made upon the theory that, when the time expired within which the road should have been completed, *ipso facto* the company forfeited all rights under the granting act, to locate and construct that portion of its line from Thomson to Ashland.

It is submitted that the fallacy of this argument is apparent upon an examination of the provisions of the act of July 2, 1864. By that act three separate and distinct grants were made.

First—The grant by which the persons named were created and erected into a body corporate and politic, and the incidents of perpetual succession, power to sue and be sued, and to have a common seal, were conferred.

Second—The grant of power to locate, construct and maintain a railroad between the termini mentioned.

Third—The grant of lands and right of way to aid in the construction of the road.

By section 8 of this act it was provided:

> "That each and every grant, right and privilege herein are so made and given to, and ac-

> cepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence work upon said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, *Anno Domini* eighteen hundred and seventy-six."

By legislation the time for completion of the road was extended to July 4, 1880, (14 Stat. 355; 15 Stat. 255).

This argument is understood to rest upon the proposition that inasmuch as the right of the company to lands east of Thomson depends upon the act of July 2, 1864, and inasmuch as no lands can fall within the terms of that act until identified by the location and earned by the construction of the road, if the company forfeited its right by lapse of time to locate and construct its road between Thomson and Ashland, the location and construction after July 4, 1880, were unauthorized and void, conferred no rights and brought no lands within the operation of the grant. But it is not admitted that by reason of the enforced delay in the location and construction of this portion of the line, the company forfeited the power to comply with the terms of its compact with the United States to complete its road from a point on Lake Superior to Puget Sound.

It is submitted that the grant of the franchise to be a corporation, to build the road and the grant of lands and right of way to aid in its construction

are, under the terms of the act, grants upon conditions subsequent, and that before advantage can be taken of a breach of the conditions, a forfeiture must have been declared by legislative declaration, or established by a judicial proceeding instituted under congressional authority for that purpose.

The whole claim of a forfeiture of the franchise to locate and construct the road between Thomson and Ashland is based upon the provisions of section 8 of the act of July 2, 1864, but the language of that section is "that *each and every grant, right and privilege* herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions. * * *"

It will be conceded by counsel for the government that if the grant of lands had attached by definite location within the time limited for the construction of the road and after the title had so vested, there had been a breach of condition subsequent, a declaration of forfeiture would be a prerequisite to an enforcement of the condition. This principle was announced by this court in Schulenberg vs. Harriman, 21 Wall. 44, and that decision has been folllowed in a long line of cases. But counsel insists that a different rule applies as to the enforcement of the condition attached to the grant of power to locate and construct the road, and it is insisted that as applied to this grant the condition is self-executing. But the argument proves too much. If the condition attached to the grant of power to locate and construct the road be self-executing, it must necessarily follow that the same

condition annexed to the grant of corporate existence is in like manner self-executing, and the argument of counsel leads to the conclusion that, because the company was unable within the time fixed by its charter to complete the road to Ashland, *ipso facto* upon the lapse of the time specified for the completion of the road, the company lost not only the power to locate and construct that portion of its line from Thomson to Ashland, but lost as well its franchise of corporate entity, and was thereby dissolved, and thus the grant of lands, the title to which had vested, would have been forfeited without a declaration of forfeiture, contrary to the intent of congress.

The mere fact that the condition attached to the grant of lands is contained in the same language as the condition attached to the grant of power to be a corporation and of power to locate and construct the road is in itself convincing evidence that, if the condition is not self-executing as respects the grant of lands, it is not self-executing as respects the grants of the corporate entity, and of the franchise to locate and maintain the road.

But the identical question here presented has been passed upon by this court. In *Bybee v. Oregon & California Railroad Co.*, 139 U S. 663, the defendant railroad company claimed title to a strip of land for right of way purposes under a grant by act of congress. By the terms of the act the road was required to be completed by July 1, 1880. The act further provided that in case the road should not be completed within the time specified, "this

act shall be null and void." The road was not located or constructed over the premises in controversy until after July 1, 1880, and it was contended that the provision that the act should be null and void in the event that the road was not completed within the time limited was self-executing and that by lapse of time the company forfeited its right to construct its road. The court reviews the authorities and concludes:

> "Upon the whole we think there is nothing to distinguish this case from *Schulenberg v. Harriman,* and that the learned judge of the court below was correct in holding that the railroad company had not forfeited its right to construct its road by failure to complete the same within the time limited."

In the case just referred to the counsel for the plaintiff relied upon certain decisions by the Court of Appeals of New York, where the court held that certain conditions annexed to grants of franchises were self-executing. This court declined to follow these decisions, and cited decisions by the supreme courts of Massachusetts and Louisiana, holding the contrary doctrine, as stating the better rule.

Since the decision by this court in the Bybee case, the New York Court of Appeals have materially modified their former holdings and in the Matter of New York and Long Island Bridge Co., 148 N. Y. 540, state the rule to be that, while it is competent for the legislature to annex a self-executing condition to a grant, strong and unmistakable language must be employed to justify a court in declar-

ing such intention, and the conclusion is reached that the words "all rights and privileges granted hereby shall be null and void" do not render the condition self-executing.

Section 8 of the Northern Pacific charter, declaring that the several grants are upon the conditions named, is followed by section 9, as follows:

> "*And be it further enacted,* That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road."

It is, therefore, clear beyond question from the very language of the act that congress did not intend that any forfeiture should take place in the absence of an express declaration.

It was also urged by counsel for the government that in the suit brought by the United States to set aside a patent upon a single tract of land, it is competent for the court to consider the question of the title of the Northern Pacific Company to the whole of its land grant and the right of the company to exercise the franchises conferred by its charter; in other words it was insisted that this suit may be enlarged into a proceeding to decree and enforce a forfeiture of all the grants conferred upon the company because a portion of the line was not com-

pleted within the time limited by the acts of congress. But the rule is well settled that forfeitures for breach of conditions subsequent, annexed to grants, can only be enforced by the grantor, and it rests with congress to determine that advantage shall be taken of a breach of condition and the attorney general cannot act for congress in this behalf.

In *United States v. Repentigny*, 5 Wall. 211-268, this court said:

> "A legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of assuming the forfeited grant, *is subject to the legislative authority of the government.* It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings."

In *United States v. Southern Pacific R. R. Co.*, 146 U. S. 570-606, the court was considering the question of the forfeiture of a grant to the Atlantic & Pacific Company and said:

> "No power but that of congress could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent."

See also: *Schulenberg v. Harriman*, 21 Wall. 44; *Farnsworth v. R. R. Co.*, 92 U. S. 49-67; *McMicken v. U. S.*, 97 U. S. 204.

And in any view of the case, any forfeiture which might have been claimed by the United States has been long since waived by subsequent

legislation and by the construction and operation of the road with the knowledge and consent of the government.

II.

Was the Power of the Company Exhausted When Its Line Touched the Lake at Superior?

The provisions of the act of congress of July 2, 1864, contained in the first section, designating the route of the proposed railroad, are as follows:

> "And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound." * * *

It is plain from the express terms of the act that the route between the termini was left to the determination of the company, subject, of course, to the implied requirement that it should be as reasonably direct as the topography of the country would allow, and subject to the authority of the land department to reject a location not conforming to this implied requirement. *Buttz v. Northern Pacific Railroad Company*, 119 U. S. 55; *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1.

And it seems equally plain that the selection of

the termini, subject to the limitations prescribed by the act, was, in like manner, delegated to the company.

The reasons for not fixing the starting point of the road on Lake Superior are well expressed in the statement of Mr. Sweat, member of congress from Maine, in his advocacy of the Northern Pacific bill before the house of representatives. Mr. Sweat said:

> "For obvious reasons it was determined by your committee not to specify in the bill the precise starting point on Lake Superior, or the place of termination on Puget Sound. To fix these irrevocably by the action of congress would place it in the power of speculators to purchase all the lands adjacent, and by an exorbitant price for them subject the corporation to unjust and heavy burdens in the commencement of their undertaking. Good policy and the interests of the country suggest the propriety of leaving the exact termini of the road undefined by the bill, and to be hereafter selected by the corporation."
>
> Congressional Globe, p. 1699, First Session, Thirty-eighth Congress.

And from the language of the act itself it is clear that congress, having failed to fix the point on Lake Superior from which the road should run, must be held to have intended to confer upon the corporation the power to fix the point. And this conclusion is amply sustained by the authorities.

In *Fall River Iron Works Company v. Old Colony and Fall River Railroad Company*, 5 Allen, 221, an injunction was sought against the defendand railroad company to restrain it from con-

structing its road across plaintiff's land. It was contended that the route adopted by the company was not authorized by its charter. By the terms of its charter, the opinion states, the defendant company was empowered to locate, construct and maintain a railroad "from a point at or near the present terminus of the track of the defendant's railroad in Fall River, in a southerly direction to the line of the state of Rhode Island, to connect with a railroad to be constructed from Newport, in the state of Rhode Island, to the line of the state of Massachusetts." It appeared that the road as located commenced at a point 2,475 feet north of the terminus of the road mentioned in the charter, and extended thence southerly across plaintiff's land. It was contended that the location was not established as contemplated by the charter.

The court said:

> "In seeking for a correct and just exposition of this clause of the statute, the first and most obvious suggestion is, that the legislature did not intend to fix with absolute certainty and precision the point of departure for the new road which the defendants were authorized to build. In using language which was so vague and indefinite as to leave open for future determination the location of this point, it is clear that, owing to the nature of the ground, or for some other sufficient reason, it was not deemed expedient or necessary to fix it with accuracy. It is also clear that in thus omitting to designate it., it was their intention to delegate the power of locating it definitely to the defendants or their agents, and to vest in them the exercise of the needful judgment and discretion to carry into effect the authority which they intended to grant. It follows, that unless

> the defendants have clearly exceeded the limits of this discretion, and have acted either in bad faith or in disregard of the just limits which, by a reasonable construction of the words of the statute, should be put on their power to fix the *terminus a quo*, they cannot be deemed to have invaded the plaintiff's rights, or be held amenable to process restraining them from prosecuting their work and constructing their road according to the plan and location set out and described in the bill."

And it was held that the location was proper.

See also Parke's Appeal, 64 Pa. St., 137. *U. S. v. Northern Pacific R. Co.*, 41 Fed. Rep. 842.

It is submitted that the company had authority to locate the terminus or point of beginning of its road at any point on Lake Superior in Minnesota or Wisconsin. This authority was doubtless subject to the supervision of the land department to the extent that the department was authorized to reject an arbitrary and capricious location of the starting point clearly not within the contemplation of the act. The purpose of the grant being to establish connection between the waterways of the great lakes and Puget's Sound, a location of the terminus at a point on the shore of Lake Superior, shut off from access to the open waters by shoals or reefs, might properly have been rejected, and the company have been compelled to relocate its point of beginning. But this implied restriction upon the authority delegated to the company to fix its starting point is the only limitation other than that contained in the words of the act that this point should be on Lake Superior in Minnesota or Wisconsin.

When the company had thus exercised its right of selection, and had fixed its point of beginning, it had full authority, under the express terms of he act, to locate its line westward from such point by the most eligible route, to be "determined by said company." The company having established its point of beginning, if the adoption of the most eligible route westward required the line to touch the lake a second time it is difficult to conceive from what source the department obtains authority arbitrarily to fix the terminus at such second point, when the terminus had been already fixed by the company by a lawful exercise of the power conferred upon it. If the adoption of the most eligible route from the point of beginning, established by the company, had made it necessary for the line to touch the lake at a second point, and this point had been on a barren shore, shut off from accesss to the open lake, and manifestly such a point as could not have been contemplated by the act as the terminus of the road,the argument is reduced to an absurdity. But, nevertheless, under such a location, the line, having touched the lake at a point west of its established terminus, would have been as much within the secretary's technical construction as is the line actually constructed, which starts as Ashland and touches the lake again at Superior.

It follows from the reasoning of the secretary that if the company had located and built from Ashland and, instead of touching at Superior, had avoided the shore line at that point by five or ten miles, the terms of the grant would have been fully

satisfied, and no objection could have been urged against such location.

But nothing can be found in the language of the act which tends in any degree to support the conclusion of the secretary that the company was prohibited from touching the lake at more than one point. Indeed, there is evidence in the language of the act that this was contemplated. The company was, by the terms of the act, authorized to commence at some point in Wisconsin, and a glance at the map will show that the most direct route from any point on the open lake to Puget's Sound must of necessity touch that portion of the lake included in St. Louis or Pokegama Bays, and that, too, at some point far distant from the natural channels of navigation, and which could never have been contemplated as the terminus of this transcontinental line.

As a matter of fact, when the road was actually located, it was found necessary, because of the character of the country, to swing south of this arm of the lake, but exact information as to facts of this nature, established only after careful surveys, cannot be presumed to have been before congress when the act was passed.

It is insisted by the Secretary of the Interior that it was the intention of congress that the proposed railroad should commence at the extreme western end of Lake Superior, either at Duluth or Superior, but there is nothing in the act or in the history of the times to support this conclusion. When the act was passed there was no city of importance on

the shore of Lake Superior in Minnesota or Wisconsin. Superior had a population of only 500, and Duluth was a hamlet of less than 200 souls.

It is matter of common knowledge that the contest has been sharp between the cities of Ashland, Bayfield, Washburn, Superior and Duluth, as to which is destined to become the principal port on Lake Superior, and this question, if settled at all, has not been settled long.

It was the intention of congress, by the grant to the Northern Pacific Railroad Company, to insure a railroad from such point on the lake as would best accommodate an interchange of traffic with the railroads from the east and south, as well as with the shipping of the lakes. It is manifest that in 1864 there were many reasons for supposing that the principal lake port would be established at some point on the land-locked Chequamegon Bay, which had then been fixed as the northern terminus of two railroads, to aid in the construction of which lands had been granted to the state of Wisconsin. (13 Stat. 67). The natural harbors of Chequamegon Bay were also many hours nearer to eastern ports by the waterways than were Duluth and Superior. These manifest considerations were matters which congress had in view when the granting act was passed, and the conditions remained the same when the company filed its map of general route in 1870 from the mouth of the Montreal river, and its map of definite location in 1882 from a point near Ashland.

It is submitted that without authority upon the

subject it is clear that when the Northern Pacific Company established its terminus on Lake Superior, it had full authority to touch the shore a second time if the adoption of the most eligible route from such terminus to Puget's Sound required it. Authority, however, is not wanting.

In *Boston and Providence Railroad Corporation v. Midland Railroad Company,* 1 Gray, 340, it appeared that the Midland Company was authorized by statute to locate and construct a railroad "commencing at some convenient point on the Norfolk County Railroad; thence through the southerly part of Dedham; thence through or near the westerly part of the towns of Canton and Milton."

The point decided by the court is clear, without further statement, from the following extract from the opinion (p. 367):

> "Again; it is argued that the location, by the act, is to commence at a point on the Norfolk County Railroad, and thence to depart from that line and run thence through the southerly part of Dedham, whereas, in fact, it runs from the *terminus a quo* more than two miles, not from, but on and over the actual location of the Norfolk County Railroad. This, we think, is a misconstruction of the language of the act. It commences at some convenient point on the Norfolk County Railroad in South Dedham, *thence*, not from that railroad or the line of that railroad, but from a point on that railroad, which it may do, if it continues to run from that point three miles on that railroad, and so must run through the southerly part of Dedham, if that railroad is in the southerly part of Dedham, which the act implies."

See also Parke's Appeal, 64 Pa. St. 137; *Kan-*

sas City R. Co. v. Attorney General, 118 U. S. 682.

The secretary of the interior lays much stress in his argument, upon the case of Atlantic and Pacific Railroad Company, 4 Land Decisions, 458. By act of congress of July 27, 1866 (14 Stat. 292), lands were granted to this company to aid in building a railroad upon a route defined by the act as follows:

> "Beginning at or near the town of Springfield in the state of Missouri, thence to the western boundary line of said state, and thence, by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river, thence to the town of Albuquerque on the river del Norte, and thence, by way of Agua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence, *by the most practicable and eligible route, to the Pacific.*"

In 1872, 1873 and 1874 maps of definite location of sections of the route were filed which carried the definite location of the line to San Buenaventura, on the Pacific ocean, and two other maps which carried the line northward 380 miles to San Francisco. These maps were approved, but no portion of the road from San Buenaventura to San Francisco was ever built.

In 1886, the secretary of the interior laid a rule on the company to show cause why the approval of the maps of definite location from San Buenaven-

tura to San Francisco should not be revoked, and it was held that the approval had been improperly allowed, and that the grant to the company was measured by the most eligible and practicable route form the point of beginning, by way of the courses mentioned in the act, to the Pacific ocean. It was said that it was not within the purpose of the act that the line, after reaching its terminus, the Pacific ocean, should skirt its shores for 380 miles; that when the Pacific ocean was reached the terms of the act were satisfied.

It is sought to draw a parallel between this case and the case at bar but they are widely different.

The Northern Pacific act provides for a railroad, not from Lake Superior, but beginning at a point on Lake Superior. *Boston, etc., Railroad Corporation v. Midland Railroad Company, supra.*

The Atlantic and Pacific grant contemplated a railroad from Springfield, Missouri, via the points mentioned in the act to the junction of the thirty-fifth parallel of latitude and the Colorado river, thence by the most eligible and practicable route to the Pacific ocean. Under these limitations it is manifest that even if the company had authority to fix its terminus as far north as San Francisco, it had no authority to locate its line by way of San Buenaventura.

> "When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be within the contemplation of the

grantor, and would be rejected as not in accordance with the grant."

St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S., 1-13.

It is manifest, therefore, that the limitations of its granting act that the road should extend from the specified point on the Colorado river *by the most practicable and eligible route to the Pacific ocean,* required by the Atlantic and Pacific Company to locate its road by the most *direct* route to the Pacific Ocean, and that it was permitted neither to make a gigantic bow as it attempted to do nor to diverge from a reasonably direct line so as to strike the ocean at an angle for the purpose of increasing its grant.

The distinction between the cases lies in the fact that the coast line, on which the Atlantic and Pacific must find its terminus, lay at right angles to the course of the road proposed, while the shore line, on which the Northern Pacific company must fix the point of beginning, lay parallel to the general course of its line.

In the former case, the choice of the terminus was restrained by the limitation that the company must build from the Colorado river to this coast line by the most practicable and eligible, and therefore, the direct route; in the latter case *the choice of the point* of beginning was restrained by the limitation that it should be on this shore line in Minnesota or Wisconsin.

It is plain that the Atlantic and Pacific Company could, and, if it complied with the terms of its act, must of necessity reach a point on the Pacific ocean suitable for a terminus, without touching the coast at any other point, whereas, as has been shown, it was not reasonably to be anticipated that the Northern Pacific Company could select such a point on Lake Superior, in the state of Wisconsin, as could reasonably be said to have been contemplated as a terminus by the act of 1864, and construct its road westward towards Puget Sound without touching the lake a second time.

And it is important to notice the circumstances under which the Northern Pacific Railroad Company made the slight change in its route, as defined by the map of general route filed August 13, 1870, so as to touch the city of Superior by its map of definite location filed July 6, 1882.

The consent of the state of Wisconsin was conferred on the company to build its railroad and telegraph line under the act of congress through the state, by an act approved April 10, 1865, and no conditions were annexed as to the location or route of the road. Acting under the consent thus conferred, the company filed its map of general route August 13, 1870, designating a line commencing at the mouth of the Montreal river and extending across the state of Wisconsin, but not touching the lake at Superior City.

This act of the Wisconsin legislature of April 10, 1865, was, on the 10th day of March, 1870, amended by attaching certain conditions, immaterial here, to

the consent theretofore conferred. (Case No. 408, Transcript, pp. 121-122.)

On the 25th day of March, 1872, the Wisconsin legislature passed an act amending the two previous acts and made the consent theretofore conferred conditional by enacting as follows:

> "Any consent heretofore given by the legislature of this state to the Northern Pacific Railroad Company to construct, operate and maintain a railroad and telegraph line in the state of Wisconsin, is hereby made subject to the further conditions, that the said Northern Pacific Railroad company shall construct and forever maintain and operate to some point on the southwesterly shore of the Bay of Superior, between the Nemadji river and Connor's Point, a line of railroad, connecting with and continuous to the main line of said Northern Pacific Railroad, by a route running south of St. Louis river from the junction of said Northern Pacific Railroad with the Lake Superior and Mississppi Railroad, intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji rivers, and running thence all the way in Wisconsin between said rivers, and also shall construct and forever maintain, at some place where said railroad shall touch the said Bay of Superior, between the said Nemadji river and Connor's Point, sufficient docks or piers, suitable and convenient for the transfer of passengers and freight from its cars on said road to lake-going craft, and from said craft to said cars, and also, shall establish and forever maintain at some place between the said Nemadji river and Connor's Point, a sufficient depot for the accommodation of passengers. And until the said Northern Pacific Railroad Company shall construct and operate such railroad to the southwesterly shore of the Bay of Superior as aforesaid, and shall so construct said docks or

> piers and the said depot, it shall not be lawful for the said company to construct or maintain or operate any other railroad in Wisconsin." (Case No. 408, Transcript, pp. 122-123.)

Thus it will be seen that the action of the Northern Pacific Railroad Company in altering the line of its road as defined by the map of general route so that the same touched the lake at Superior City was not the result of any vacillation of purpose, but was in obedience to the positive requirements of the state of Wisconsin.

This act and the considerations which induced its passage are items in the history of the times which are important in this case. If, as is contended, the Northern Pacific Company had fixed its eastern terminus at Duluth by consolidation with the Lake Superior & Mississippi Company, and was thereby precluded from extending its line eastward, it could not act under the consent conferred by the state of Wisconsin and an act attaching conditions to this consent was an idle thing.

III.

Did the Northern Pacific Company Effect a Consolidation with the Lake Superior Company Within the Meaning of Section 3, of the Act of July 2, 1864?

By the decision of the secretary of the interior of August 27, 1896, (23 L. D., 204), it was held that

the purchase of the half interest in that portion of the road of the Lake Superior and Mississippi Company extending from Thomson Junction to Duluth, and the joint use and operation of this portion of road by the two companies constituted a consolidation, confederation and association, between the companies within the meaning of sec. 3, of the Northern Pacific act of July 2, 1864, and that thereby Duluth became fixed as the point of beginning of the Northern Pacific Railroad on Lake Superior.

The provisions of sec. 3, under which it is claimed that a consolidation was effected, are as follows:

> "*Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate and associate with said company upon the terms named in the first section of this act."

Where the line of the proposed railroad was found on the same general route as that of another land grant road, one of three courses was open to the companies

First. Both roads might be constructed without reference to each other; but, inasmuch as it was not the policy of congress to make two grants for two roads between the same points, it was provided that the amount of the earlier grant should be deducted

from the lands granted to the Northern Pacific Railroad Company.

Second. The company receiving the earlier grant might assign its interest to the Northern Pacific Company. This authority was doubtless given in the interest of the prior land grant company, as well as in the interest of the Northern Pacific. If, when the routes of the two roads were laid down, the company having the earlier grant should find its proposed road paralleled for a considerable distance by the transcontinental line of the Northern Pacific, it would be doubtful policy for such company to construct this portion of its line. If its grant, however, required a continuous road between specified termini, it might become subject to a forfeiture for a failure to construct the road the full distance. The provision for assignment of the land grant plainly contemplates the construction of a single road over that portion of the lines which should be found upon the same general route. By this means the Northern Pacific company would receive its full grant of lands and the assigning company would be relieved from its obligation to reach the terminus specified in its grant, and divide its earnings with a competing line.

By the adoption of this course the two corporations would retain their individual identity and the Northern Pacific Company would be entitled to its full grant of lands, unaffected by a conflict with the prior grant.

Third. The last course contemplated by the act,

and the one which it is claimed was adopted, was that of consolidation. But it is to be observed that the "consolidation, confederation and association" provided for is "upon the terms named in the first section of this act." The first section provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in congress assembled, that Richard D. Rice (and others) and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style and title of the 'Northern Pacific Railroad Company,' and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States and may make and have a common seal."

The "terms named" must be found in the language quoted.

A consolidation, confederation and association upon the terms named would effect an amalgamation of the two companies into one, for it is provided that the persons named in the act and *all such other persons who shall or may be associated with them*, are created and erected into a body corporate to be known as the Northern Pacific Railroad Company. By such a consolidation the stockholders of the consolidating company would become the associates of the members of the Northern Pacific Company; the two corporations would become merged, the interests of the several stockholders would be identical and the Northern Pacific Company receiving the full grant would hold it for the benefit of the mem-

bers of the consolidating corporation as well as for the benefit of its own original members.

It is apparent, however, under any construction of the first section, that the two methods provided by its charter, by means of which the Northern Pacific Railroad Company might acquire the lands which would otherwise have been excepted from its grant, were both authorized with the single object of insuring a full grant to the Northern Pacific Company, and of avoiding complications in its adjustment. This is plain from the fact that neither an assignment nor a consolidation was authorized except in the event of there being a prior grant of lands to another company whose line should be upon the same general route as that of the Northern Pacific Railroad.

The purpose of the consolidation authorized by the act being to unify the interests of the two companies *in the lands* which would otherwise be excepted from the Northern Pacific grant, it is difficult to conceive how such transactions as were had between the Northern Pacific Railroad Company and the Lake Superior & Mississippi Railroad Company, which left each company existing as a separate and distinct corporation, and did not affect, in the slightest degree, their interests in their respective land grants, can be held to be a consolidation within the meaning of the act.

Aside from the considerations just mentioned, which, it is submitted, show conclusively that a consolidation in the sense of an association of stockholders, and a merger of corporations, and that

alone, was contemplated, the words "consolidate, confederate and associate," standing by themselves, demand the construction which we have shown is required by the context.

In Morawetz on Private Corporations, vol. 2, sec. 939, it is said:

> "There is no doubt that the general effect of a consolidation is the formation of one corporation by the shareholders of several corporations, and the dissolution of the latter as originally constituted."

The author bases a further statement on the authority of *Houston, etc., R. R. Co. v. Shirley,* 54 Tex. 125, as follows:

> "The distinguishing feature of a 'consolidation' is the union of the shareholders of two companies, thereby forming one company. This is essentially different from the purchase by a corporation of the property and concerns of another company at a foreclosure sale; and the fact that the company whose property was sold was declared by statute to be 'merged and consolidated' with the purchasing company would make no difference."

See also: *Clearwater v. Meredith,* 1 Wall| 25-40; *Shields v. Ohio,* 95 U. S. 319; *Railroad Co. v. Georgia,* 98 U. S. 359.

And this conclusion becomes irresistible when the purpose of the Northern Pacific grant is considered. Congress made this grant to insure a continuous line of road from a Lake Superior port to Puget Sound, to be owned by one company and operated under one management and subject to the demand of the United States for the transportation

of the mails and munitions of war. The road contemplated was a road to be owned and operated as a unit and not to be composed of fragments owned in whole or in part by other companies and leased or held in common by the corporation created by congress. With this purpose in view the consolidation authorized was required to be upon the terms named in section one of the act, under which the stockholders of the consolidating company would become members of the corporate body created by congress, and the Northern Pacific Railroad Company would become the *owner* of the whole road.

The argument of the secretary that these two companies effected a consolidation, besides passing over the qualification that the consolidation authorized must be upon the terms named in section one, and leaving out of consideration the manifest purpose of the consolidation contemplated, finally reaches its conclusion upon an assumption which is wholly false.

It is declared that except for the authority conferred in its charter to consolidate, there was a total want of power in the Northern Pacific Company to purchase a half interest in the line from Thomson Junction to Duluth; and that from the fact that the company is to be presumed to have been acting within its powers, it must follow by presumption that this purchase was under the authority to consolidate conferred by the granting act.

This argument, however, avoids any mention of the provisions of the act of the legislature of Minne-

sota of March 2, 1865 (Case No. 121, Transcript, pp. 36-37; Case No. 408, Transcript, pp. 118-120), conferring the consent of the state of Minnesota for the construction of the Northern Pacific Railroad through that state, which consent was required by sec. 18 of the act of July 2, 1864. This act of the Minnesota legislature, after conferring authority to construct the road as proposed, imposed the following conditions:

> "*Provided*, That should the said company elect to make the eastern terminus of said road east of the eastern boundary of the state of Minnesota, then and in that case, they shall construct, or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior within the state of Minnesota, of the same gauge as said main line, for which purpose the same powers, rights and privileges are hereby granted to said company as they have or may have to construct said main line within the state of Minnesota."

By virtue of the act imposing the condition the Northern Pacific Railroad Company not only received the power to maintain and operate a line to Duluth, separate and distinct from its main line, but its authority to maintain its line across the state of Minnesota was dependent upon its compliance with this requirement. And when it is considered that less than two years before, in August, 1870, the company had put itself on record in the matter of its point of beginning on the lake, by filing a map of general route from the Montreal river, the facts, instead of supporting the proposition that a consolidation was effected, tend rather to the conclusion that

the company had fixed its point of beginning east of the eastern boundary of the state of Minnesota. The company has never claimed an acre of land by virtue of the line to Duluth (Case No. 408, Transcript p. 149), and its maintenance and operation of this line without such a claim is ample evidence that it was held and operated under the powers conferred by the state of Minnesota, for the purpose of complying with the requirement of that state, and that this branch was not, and was not intended to be, a part of the main line contemplated by the act of congress.

There can be no doubt of the authority of the Northern Pacific Railroad Company under the provisions of the Minnesota statute to acquire by purchase a half interest in the line from Thomson to Duluth.

It has been held by this court that authority to build and construct a line between given points carries with it by necessary implication, the authority to purchase a line already constructed between those points. *Branch v. Jesup,* 106 U. S. 468.

And the purpose of the legislature of Minnesota in imposing this requirement upon the company was subserved as well by the means adopted, as by the unnecessary construction of a parellel line to the waters of Lake Superior at Duluth.

In this connection, the action of the two companies in 1873 is important. In the month of February, in that year, the directors of the Northern Pacific Company were informed that claim was made by the officers of the Lake Superior and Mississippi

Company that the effect of the transactions, evidenced by the deed of January 1, 1872, whereby the Northern Pacific Company purchased a half interest in that portion of the line extending to Duluth, was to fix the eastern terminus of the Northern Pacific Railroad at Duluth; and thereupon, by resolution, the directors of the Northern Pacific Company called upon the Lake Superior & Mississippi Company for an agreement construing the agreement of January 1, 1872, that the same should not be held to intend or have intended, to fix the eastern terminus of the Northern Pacific Railroad at Duluth; and thereafter, on the 2nd day of June, 1873, the Lake Superior & Mississippi Company, by resolution of its board of directors duly adopted, agreed with the Northern Pacific Company that the agreement of January 1, 1872, should not be held to intend or have intended that the eastern terminus of the Northern Pacific Railroad should be, or was, by virtue of said agreement, established at Duluth. (Case No. 408, transcript pp. 140-141).

It is clear that the construction of all these transactions and agreements must be reached in the light not only of the legislation of the state of Minnesota, but in view of all the attendant circumstances, and this construction placed upon the agreement of 1872 by the parties is entitled to the greatest weight. This court said in the case of *Chicago v. Sheldon*, 9 Wall. 50, 54:

> "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties them-

selves is entitled to great, if not controlling, influence."

There could be no consolidation unless the parties intended to consolidate, and their solemn declaration, evidenced by an agreement entered into when the conditions were the same as when the Northern Pacific purchased a half interest in this branch road, is sufficient in itself to negative the claim that the companies intended to consolidate under the provisions of the Northern Pacific charter.

But it is suggested in answer to this most natural explanation of the purchase of a half interest in the twenty-six miles of road from Thomson to Duluth, that the grant of power by the state of Minnesota to the Northern Pacific Railroad Company, authorizing it to comply with the condition imposed, by connecting its main line with the waters of Lake Superior, by means of a branch to some point within the state, was void for the reason that the state could not confer a franchise on this company created by congress.

There can be no question of intent or of statutory construction, for the act of the Minnesota legislature is clear and unambiguous, and if the power existed in the state of Minnesota to confer on the company a franchise to build or acquire an interest in this branch road, such a franchise was manifestly conferred.

The Northern Pacific Railroad Company, created by federal authority, comprised an association of persons upon whom had been conferred the fran-

chise to exist as a corporation. It was organized under the constitutional power of congress to establish postroads, regulate commerce and provide for the national defense. It was no migrant. It was in no sense a foreign corporation. *Commonwealth v. Texas & Pacific R. Co.*, 98 Pa. St. 90.

Its domicile was the United States, and it was no more a stranger in the state of Miinnesota than a corporation created by the laws of that state. The consent of the state, obtained in compliance with the act of congress, made lawful the operations of the company within the boundaries of the state.

The United States obtained the authority to create this company and to confer upon it the franchise to build a road to the Pacific by virtue of the grant of powers contained in the constitution, and it must be remembered that before the authority of the state to grant this additional franchise can be challenged, some distinct limitation must be pointed out either in the constitution of the United States, or in the constitution of the state.

The power of the legislature of Minnesota to erect into a domestic corporation the same individuals named in the Northern Pacific charter, under another name or under the same name, and to confer on such corporation a franchise to build a branch road to the waters of Lake Superior, would not be questioned, and it is difficult to understand how or why the hands of the state are tied so that she may not confer on this corporation, already created by congress, the power to build a branch road.

There can be no distinction between the authority

of a state to confer corporate powers upon a federal corporation, and the authority to confer a franchise upon a corporation created by the laws of another state. It is doubted if the power of a state to do the latter has ever been questioned. It is a matter of common knowledge that there is scarcely a railroad in the country touching two or more states that does not rely upon legislation of this character for certain of its franchises, and the authority of the states to grant such franchises has been recognized by this court.

In *Pennsylvania Railroad Company v St. Louis, etc., Rd. Co.,* 118 U. S. 290, there was a controversy as to the jurisdiction. The suit was brought in the circuit court for the district of Indiana by the complainant as the successor of the Terre Haute & Alton Railroad Company, a corporation created by the state of Illinois. It was insisted by the defendants, certain of whom were citizens of Indiana, that the Terre Haute & Alton Company and the complainant, its successor, were Indiana corporations. The question turned upon the effect of certain Indiana legislation and the court held that the Indiana legislation merely *conferred a franchise* on the Illinois corporation to operate a road in Indiana, but did not make it an Indiana corporation. To the same effect is *Goodlett v. Louisville etc. Rd. Co.*, 122 U. S. 391.

In *California v. Pacific Railroad Companies,* 127 U. S. 1, the court considered certain assessments by the state of California of the property of various state railroad corporations, upon which con-

gress had conferred franchises to build and maintain railroads. It was insisted by these companies that their federal franchises had been assessed in bulk with their other property, that these franchises were not taxable by the state and that the whole assessment was therefore void. The claim so made required the court to examine the legislation under which the several companies were created, and from which they derived their franchises.

Speaking of the organization and franchises of the Central Pacific Railroad Company, the court said:

> "Originally, the Central Pacific Railroad Company of California had only power to construct a railroad from Sacramento to the eastern boundary of the state. Congress, by act of 1862, authorized the company (in the words of the act) 'to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned (the Union Pacific), and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California.' * * * *
>
> "This important grant, though in part collateral, to, was independent of, that made to the company by the state of California, and has ever since been possessed and enjoyed."

The foregoing argument has been presented upon the assumption that there is no provision in the Northern Pacific charter authorizing the company to take this grant of power from the state of Minnesota. But the provisions of the charter must not

be overlooked, and it is submitted that authority is there conferred in express terms to receive and exercise the franchise conferred by the state of Minnesota.

> "Sec. 17. *And be it further enacted,* That the said company is authorized to accept to its own use, any grant, donation, loan, power, franchise, aid or assistance which may be granted to, or conferred upon, said company, by the congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid, or assistance to its own use for the purpose aforesaid."

The section authorizes the company to accept to its own use any grant, power or franchise which may be conferred upon it by any state, and to hold and enjoy such grant, power or franchise "to its own use for the purpose aforesaid." Manifestly full authority is here given for the very grant of power which the state of Minnesota conferred. What is "the purpose aforesaid"? Clearly not merely the building and operating a line of railroad to the Pacific, for congress had by the act itself conferred every power and franchise required for that purpose. The power of eminent domain was conferred, and it was competent for congress to confer this power within the states as well as within the territories. *Kohl v. United States,* 91 U. S. 367.

The company being fully empowered to do all those things necessary to the mere building and operating a road from Lake Superior to Puget's

Sound, the "purpose aforesaid" cannot be thus narrowly restricted.

In *Winona & St. Peter Rd. Co. v. Barney,* 113 U. S. 618, 625, speaking of the act of 1857, granting lands to the state of Minnesota to aid in the construction of railroads, the court said:

> "The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed as well as to the purpose declared on their face, and read all parts of them together."

And the court added:

> "The policy of the government was to keep the public lands open at all times to sale and pre-emption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways."

And what was true of the purpose of congress in granting lands to the state of Minnesota is pre-eminently true of its purpose in making the grant for a railroad through the wilderness across which it was proposed to build the Northern Pacific Railroad. The principal and indeed the primary purpose of congress in passing this act was to encourage and render possible the settlement and development of a vast domain till then practically unknown and inaccessible. There was but a scanty popula-

tion on the Pacific coast, and little, if any, settlement in the country to be traversed. The conditions existing in 1864 demanded no post route and there was no commerce to be served, but the grant was made and the road was built solely with a view to the changed conditions to be brought about by the means adopted. *U. S. v. Union Pacific R. Co.*, 91 U. S. 72.

The extent of the land grant conferred is itself a sufficient argument that congress did not intend to deprive the company of the necessary means of rendering the construction of its transcontinental line a practicable enterprise. A section of land forty miles distant from a railroad is as worthless as if a thousand miles distant, and but for the construction of branch lines the bulk of the lands granted to aid this great undertaking would have been a burden and not a benefit. And if the Northern Pacific Railroad Company had had no power to construct or to aid in the construction of such roads they would never have been constructed. It is well known that even under the present conditions, the earnings of scarcely a single branch line tributary to the Pacific roads are sufficient to justify their operation, except as feeders for the through lines. As independent enterprises, they could never be maintained.

Finally, independent of the Minnesota legislation and of the provisions of section 17 of the charter, the power to build or acquire by purchase a half interest in the twenty-six miles of road from Thomson Junction to Duluth, to be operated as a

branch line or feeder to the transcontinental road, is a clear incident of the general powers conferred by the charter.

In *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, the supreme court said:

> "The general doctrine upon this subject is now well settled. The character of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

See also *Union Pacific Ry. Co. v. Chicago etc. R. Co.*, 10 U. S. A. 98.

Bearing in mind the purpose for which congress created this corporation and conferred upon it the grant of lands, and bearing in mind that the only way in which that purpose could have been effectuated was by means of such franchises as that conferred by the state of Minnesota, can there be any doubt of the power of the state to grant, or of the company to enjoy, the franchise conferred?

Returning to the first premise in the argument, which, it is claimed, establishes a consolidation, it will be observed that the fact is assumed that the lines of the two roads are found upon the same general route. It is apparent that this is a necessary premise, for only where this condition existed was a consolidation authorized. There is, however,

nothing to support this conclusion thus assumed, except a course of reasoning in a circle.

It is said, first, that the company fixed its point of beginning on Lake Superior at Duluth, and having located to Thomson Junction, it follows that the lines of the two roads were in the same general route. But the fact that the point of beginning was at Duluth depends upon the fact of consolidation, and it is not contended that Duluth was so fixed as the eastern terminus, unless a consolidation is established. The act only authorized a consolidation where the routes of the two roads were on the same general line. This condition required that there should be two points common to both roads, and both of these points, to answer to the conditions of the act, must be points upon the line of the Northern Pacific Railroad located under the act of congress. Thomson Junction was manifestly such a point, but if the Northern Pacific Company acquired an interest in the line to Duluth for the purpose of complying with the Minnesota legislation, Duluth would not be such a point, but, at most, would be a terminus of a branch line. In other words before it can be said that Duluth was on a point on the main line of the Northern Pacific Railroad located and constructed under the act of congress, some fact must appear from which it may be shown that the Company exercised the power of selecting its point of beginning, conferred by the act, in favor of Duluth.

The whole argument loses sight of the fact that everything which the company had done up to this

time was with the manifest intention of establishing its point of beginning near Ashland.

It is submitted, furthermore, that if the Company had seen fit to locate its point of beginning at Duluth this very fact would have precluded it from effecting a consolidation with the Lake Superior & Mississippi Railroad Company. Thomson Junction does not lie on the direct route from Duluth to Puget Sound, and, if the company had filed a map of definite location showing its point of beginning at Duluth, and its course by way of Thomson Junction to Puget Sound, the department would have been instant in its demand for proof that a reasonably direct course westward from Duluth was impracticable because of the conformation of the country, and, in the absence of such proof would have rejected such a map, and properly under the authorities cited in an earlier part of this brief.

Upon another ground it is earnestly submitted that the lines of the Northern Pacific Company and the Lake Superior & Mississippi Company cannot be said to be upon the same general route. The purpose with which the first proviso was inserted in the Northern Pacific act was to guard against bestowing land grant aid for the construction of an unnecessary piece of road. It was against the policy of congress to encourage the building of a road to parallel and compete with another road already constructed or assured. But it provided for a deduction from the Northern Pacific grant only where the route of another company having an earlier grant was found upon the same

general line. What did congress mean by the words "Same general line?" Manifestly, if two roads lay parallel for a distance of one mile or two miles when approaching a common terminus, and then diverged, the routes could not be said to be on the same general line within the meaning of the proviso. The meaning of the language must be found in the purpose for which it was employed. As has been said, that purpose was to avoid granting aid to two parallel and competing lines, either of which could accommodate the traffic. Where the two roads were found on the same general line, it was provided that the company having the earlier grant might assign to the Northern Pacific Company its interest in the lands which would otherwise be deducted from that company's grant, with the plain purpose of allowing the Northern Pacific Railroad Company to earn its full grant, and contemplating the construction of but one road where the proposed lines were on the same general route. If the routes, Northern Pacific Railroad and the Lake Superior & Mississippi Railroad, from Thomson Junction to Duluth, were on the same general line, an assignment of its land grant by the Lake Superior & Mississippi Company, and its abandonment of construction north of Thomson, would have fixed its terminus in the pine barrens only twenty-six miles from the waters of Lake Superior. It is true that at this point passengers and freight could have been transferred to the Northern Pacific Railroad and transported to Duluth over that road; but it is also true that such a makeshift

would not have reasonably accommodated the traffic between St. Paul and Duluth. The inconvenience to passengers would have been unendurable, and the expense of transferring freight would have been vastly greater than the cost of operating the road a few miles farther to a natural terminus on Lake Superior. The two roads, if actually constructed, the one from Duluth by way of Thomson to Puget Sound, and the other from Duluth by way of Thomson to St. Paul, could in no sense be said to be parallel and competing lines. If one had been completed when the other was projected, the fact would not have been considered for an instant in determining the policy of granting aid for the construction of the whole projected line.

The general direction of one road is north and south; the general direction of the other east and west; and the two roads are as far from being on the same general line as it is possible to conceive.

IV.

The Perham Map.

In the interest of Doherty and the United States certain facts are included in the agreed statements relating to a map of the proposed general route of the Northern Pacific Railroad transmitted to the secretary of the interior March 6, 1865, and an argument is based on the filing of this map to support the conclusion that the company manifested

an intention to fix the point of beginning of its road at or near Duluth.

It is agreed that this map marked Exhibt A in the Doherty case and Exhibit 1 in the United States case, is a true and correct copy of a certain map or plat now in the office of the commissioner of the general land office, which said map or plat was transmitted by Josiah Perham, president of the Northern Pacific Railroad Company, to the secretary of the interior on the 6th day of March, 1865. (Case No. 121, transcript p. 53; Case No. 408, transcript p. 103.) With the original map Mr. Perham sent a letter stating that he had designated upon the map the general line of the Northern Pacific Railroad from a point on Lake Superior in *Wisconsin*. (Case No. 121, transcript p. 53; Case No. 408, transcript p. 104.)

Upon receiving this map and letter, the secretary transmitted them to the commissioner, suggesting a withdrawal of lands along the line in Minnesota and *Wisconsin*. (Case No. 121, transcript p. 54;

Upon receipt of the map by the commissioner of the general land office, that officer, upon June 22, 1865, addressed a communication to the secretary, recommending that the map be rejected for the reason that it did not conform to the regulations of the department. (Case No. 121, transcript p. 101; Case No. 408, transcript pp. 105-107.)

Case No. 408, transcript p. 104.)

It further appears in the United States case that there is endorsed upon the said letter the words "Sec'y sustains Comm's refusal," (Case No. 408,

transcript p. 108) and that, except as above stated, the department of the interior has never taken any action under or relative to said map, or made any withdrawals of lands thereunder. (Case No. 408, transcript p. 109.) In the Doherty case it is stipulated that the recommendation of the commissioner was approved by the secretary by endorsement on the letter of the commissioner. (Case No. 121, transcript p. 101.)

An examination of the map discloses two lines extending westward from Lake Superior, and uniting about one hundred miles west of the boundary line between Minnesota and Dakota. The lower of these two lines commences at a point in Wisconsin near the mouth of the Montreal river, but over its whole course is drawn a wavy line of erasure. The upper line commences at a point on Lake Superior at or near the present site of Duluth.

The map presents an alteration apparent upon its face, and, reading the letter of President Perham, written to accompany and explain the map, it will be seen that he describes but one line upon the map, and that line from a point on Lake Superior in *Wisconsin*, by which the conclusion is supported that when the map was filed the only line shown was the lower line from the Montreal river, and that this line was erased and the upper line added at some time after the filing of the map. And this conclusion is much strengthened when it is considered that the letter from the secretary to the commissioner, written after the map was received, and referring to the letter of Mr. Perham, suggests a

withdrawal for ten miles in width in Minnesota and Wisconsin. An examination of the map renders it extremely doubtful if a withdrawal of ten miles on the upper line would reach the Wisconsin boundary.

It seems clear that in order to render the map admissible, the patent alteration should have been explained.

Greenleaf on Evidence, Vol. I, Sec. 564 (15th Ed.).

In any event it is clear that the company acquired no rights whatsoever under this map and that it was ineffectual for any purpose. It appears that the map has never been recognized by the department, but, on the contrary, that it was rejected. The indorsement upon the letter of the commissioner of the general land office of the words "Sec'y sustains Comm's refusal" is sufficient evidence of the fact there stated, even if unsupported by the agreed fact that thereafter the department failed to recognize the map. A public record kept in obedience to the requirements of the law is evidence of the facts therein recited.

In *Galt v. Calloway*, 4 Peters 332, the court said:

> "The register of the land office keeps a record of all entries and surveys, and on his official certificates patents are issued by the government. His records are always under his control, and all entries made in them are made by himself or by a person authorized to act for him. As the records of this office are of great importance to the country, and are kept under the official sanctions of the government, their contents must always be considered, and they

> are always received in courts of justice as evidence of the facts stated."

In any view of the questions just presented, the map is clearly inadmissible in evidence for the reason that no facts are shown conferring any authority on Mr. Perham, as president, to take action on behalf of the company in locating the line of its railroad. On the other hand, it appears by the record that the minutes of the board of directors of the company, from the first meeting of the board, December 7, 1864, up to a date long after the filing of the Perham map, show no action whatever by the board with reference to locating the line. (Case No. 121, transcript p. 100; Case No. 408, transcript p. 108.)

The powers and duties of the president, as prescribed by the by-laws adopted by the company January 11, 1865, give him no such authority as that sought to be exercised. (Case No. 121, transcript p. 100; Case No. 408, transcript pp. 109-110.)

There is no implied authority in the president of a railroad corporation to act for the company in locating its line. "His powers over its business are simply the powers of an agent such as are delegated to him by the directors." 1 *Wood on Railroads*, p. 494.

In *Walworth County Bank v. Farmers' Loan & Trust Company*, 14 Wis. 351, it was held that there was no implied authority in the president of a railroad company, by virtue of his office, to sell 25,000 ties belonging to the company, and that to support a title depending on such a sale, it was essential to prove actual authority in the president.

It is pertinent that in the years 1866, 1867, 1868 and 1869, the Northern Pacific Railroad Company caused exploring and surveying parties to be put into the field for the purpose of ascertaining the most practicable route for a railroad, to be constructed under the provisions of the act of congress, from a point on Lake Superior, in Minnesota or Wisconsin to Puget Sound, and that these parties made surveys of various lines for railroad routes, commencing at about ten different points on Lake Superior and extending westwardly therefrom, and from time to time reported to the board of directors of the company the result of such surveys and explorations. (Case No. 121, transcript p. 38; Case No. 408, transcript p. 110.)

It appears, therefore, that in the year 1865 the directors of the company had acquired no adequate information upon which to base a judgment as to the practicable location of even the general route of the road.

This court has considered this map, and held that it was inoperative as a location of the road. *United States v. Northern Pacific R. R.*, 152 U. S. 248, 292. See also *Oregon & C. R. R. Co. v. United States*, 77 Fed. Rep. 67.

V.

The Location and Construction of the Northern Pacific Railroad.

But the decision of this case does not depend on whether the filing of the Perham map was author-

ized or unauthorized, or on what vague purposes the company may have had in 1865, when it was without accurate knowledge of the country to be traversed by its railroad. The question is, did the company finally exercise the power conferred upon it to select its point of beginning on the lake, and its line of route westward, and did it select Ashland as that point?

The record facts as to location and construction may be repeated. August, 13, 1870, the company transmitted to the secretary of the interior a map of the general route of its proposed railroad from the mouth of the Montreal river to the Dakota boundary. This map was accepted by the secretary and by him caused to be filed in the office of the commissioner of the general land office. (Case No. 121, transcript pp. 39-40, Exhibit 1; Case No. 408, transcript pp. 123-124, Exhibit 4.)

On May 9, 1882, the company duly adopted its line of definite location from Thomson Junction to a point a few miles west of the Montreal river, and a few miles east of Ashland, and on July 6, 1882, a duly certified and authenticated map of the line of definite location so adopted, was transmitted to the secretary of the interior, who accepted the same and caused it to be filed in the office of the commissioner. (Case No. 121, transcript pp. 42-44, Exhibit 2; Case No. 408, transcript pp. 125-127, Exhibit 6.)

On August 20, 1884, the board of directors of the railroad company adopted a resolution fixing the point of beginning at the city of Ashland, and a cer-

tified copy of this resolution was transmitted to the secretary of the interior, December 3, 1884. The point so fixed as the point of beginning was on the line of definite location of 1882, and about twelve miles west of the most easterly point on this line. (Case No. 121, transcript pp. 47-49; Case No. 408, transcript pp. 133-135.)

Upon receipt of the resolution of the directors fixing the point of beginning at Ashland, the commissioner adopted the terminal so fixed, and prepared a diagram showing the same and the limits of the land grant, with reference thereto, and issued instructions for the adjustment of the grant upon this basis. (Case No. 121, transcript pp. 48-49, Exhibit 3; Case No. 408, transcript p. 134-135, Exhibit 7.)

The railroad from Thomson Junction to Ashland was duly constructed, and, on the recommendation of the commissioners appointed to examine the same, was accepted by the president of the United States, in the years 1881, 1882, 1883 and 1884.

These facts bring the case clearly within the plain construction of the act and of the authorities construing similar acts.

In *Kansas Pacific R. Co. v. Dunmeyer*, 113 U. S., 629-634, the court said:

> "We are of the opinion, that, under this grant, as under many other grants containing the same words or words of the same purport, the act which fixes the time of definite location is the act of filing the map, or plat, of this line in the office of the commissioner of the general land office. * * *. The company makes its own preliminary and final surveys by its own

> officers. It selects for itself the precise line on which the road is to be built, and is, by law, bound to report its action by filing its map with the commissioner, or rather in his office."

In *Sioux City, etc., Land Co. v. Griffey*, 143 U. S. 32, the court, commenting on the case last cited, and others, said:

> "The reasoning of these cases is applicable here. The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the line upon which it will build, by a comparison of the cost and advantages of each and only when by filing its map it has communicated to the government knowledge of its selected line, is it concluded by its action."

See also:

> *Van Wyck v. Knevals*, 106 U. S. 360-366; *Walden v. Knevals*, 114 U. S. 373.

Unless some facts exist showing an exercise of the power to fix the point of beginning at some point other than Ashland, the filing of the map of definite location, followed by the resolution of the board of directors, establishing the point of beginning at Ashland, must be conclusive. And there are no such facts. The company never filed a map to Duluth, and never claimed or intended its branch to that point to be a part of its main line. The company never having exercised the power to establish its point of beginning at Duluth, its definite location and construction to Ashland was competent and is conclusive in determining the location of the road. *Western Pennsylvania R. R. Co.'s Appeal*, 99 Pa. St. 155.

The charge is made in one of the decisions of the secretary above referred to, that the line constructed from Thomson Junction to Ashland was an afterthought, and that no intention existed to construct as far east as Ashland until it became apparent that the line from Bayfield to Superior contemplated by the grant to Wisconsin by the act of May 5, 1864, had been abandoned. The filing of the map of general route in 1870, is an answer to this, and, further, the record shows that the line to Ashland was definitely located, and constructed, several years before the road was contemplated to Puget's Sound.

The road was both located and constructed in sections, which were afterwards united, which course was fully authorized by the granting act. *St. Paul and Pacific Railroad Co. v. Northern Pacific R. Co.*, 139 U. S. 1-19.

Construction was extended west from Thomson Junction to a point fifty-five miles west of Helena, Montana, and east from Wallula Junction, Washington, to the point fifty-five miles west of Helena, and these sections were completed and united in 1883. From a point near Wallula Junction the road was extended to Tacoma, on Puget Sound, in 1885, 1886 and 1887, a distance of more than 300 miles (Case 121, transcript p. 49; Case No. 408, transcript pp. 135-136.)

It is submitted that no sound argument can be based on these facts to support the proposition that the Northern Pacific Company lost its rights from Thomson to Ashland, when that portion of its road

was completed three years before its line over the Cascade mountains.

Denver & Rio Grande R. R. Co. v. Alling, 99 U. S. 463-477.

VI.

The Acceptance of the Map of Definite Location Vested the Grant of Right of Way and is Conclusive

In the cases of *Van Wyck v. Knevals,* 106 U. S. 360; *Kansas Pacific R. Co. v. Dunmeyer,* 113 U. S. 629, and *Walden v Knevals,* 114 U. S. 373, the court considers the question of what constitutes a location and what is necessary to constitute an approval of a map of definite location by the land department. In *Walden v. Knevals,* the court said:

> "Since the decision in that case (*Van Wyck v. Knevals*) the court in *R. Co. v. Dunmeyer,* 113 U. S. 629, has reconsidered the question and come to the same conclusion, the receipt of the map in the land office without objection being considered as equivalent to its acceptance."

The action taken by the secretary and commissioner upon receipt of the map of definite location in 1882 presents a much stronger case than a mere receipt without objection, for the secretary directed and the commissioner made withdrawals of land forty miles on each side of the line from Thomson to Ashland.

There can be no doubt that the map was approved, and the map being approved and the road located, the title to the right of way vested by relation

as of July 2, 1864. *St. Joseph, etc., R. Co. v. Baldwin*, 103 U. S. 426.

The title to the right of way having become vested by the approval of the location, the secretary of the interior was powerless, in 1895, to disturb the rights acquired under the decision of his predecessor. The secretary, in his opinion, seeks to evade this conclusion by declaring that the act of the department in approving the map in 1882 was a nullity because of a want of jurisdiction. It is argued that the department was without jurisdiction to approve the location of a line touching the lake at more than one point. This argument has already been considered, but it finds a further answer in the decision in *Noble v. Union River Logging Co.*, 147 U. S. 162. In this case the following facts appeared:

The Union River Logging Company was incorporated in 1883, under the laws of the territory of Washington, for the purpose, as declared by its articles, of maintaining a logging railroad of about ten miles in length. In 1888 it amended its articles so that its object was declared to be to construct and maintain a railroad and telegraph line over a much longer route, and to carry passengers and freight, and also to carry on a general logging business. For the purpose of acquiring a right of way through the public lands under the provisions of the act of Congress of March 3, 1875, (18 Stat. 482), the company filed in the year 1889, at the district land office, its articles of incorporation,

and other documents required, together with a map showing the route of its road through the public lands. These papers were transmitted to the commissioner and by him to the secretary, who approved them. Subsequently Secretary Noble, who had succeeded Mr. Vilas, by whom the approval had been allowed, entered an order revoking this approval, and, upon a bill in equity being filed to enjoin the secretary and commissioner from executing the order revoking the approval, the defendants answered, that since approval of the map, it had come to their knowledge that the plaintiff company was a mere private logging corporation, and was in no sense a common carrier, and that the act of congress granting the right of way through the public lands did not contemplate such a grant to companies other than common carriers. The hearing being had upon bill and answer, the facts above stated were admitted. It was contended by the defendants that, inasmuch as the plaintiff company was not such a company as was contemplated by the act of 1875, the approval of its map by Secretary Vilas was an act done without jurisdiction and was void. The court held, however, that the question as to the character of the company was properly before Secretary Vilas, and that by his approval of the company's map this question was concluded in its favor. It was held, further, that by virtue of the approval of the map the right of way vested in the company, under the present grant contained in the act of 1875, and the court said:

"A revocation of the approval of the secre-

> tary of the interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void."

The parallel between the Noble case and the case at bar is plain. As has been shown, a discretion was committed to the land department to be exercised in accepting or rejecting the location of the Northern Pacific Railroad. As we have shown, the company had authority, under its grant, to select its point of beginning on Lake Superior, and its route from such point westward to Puget's Sound. This authority to select its point of beginning was subject to the authority of the department to require that it should be such a point as was reasonably contemplated by the granting act, and the department could have rejected a selection of a point inaccessible for lake vessels. When the point of beginning was properly selected and approved by the department, the location of the route westward was also subject to the approval of the department to the extent of requiring the road to be located on a reasonably direct line. The judgment approving the selection of the point of beginning and the location of the route necessarily depended upon questions of fact, and the decision of the department upon these questions, and its ultimate approval of the line, must be held to be conclusive, as was the similar decision in the case last considered.

Further, the approval of the company's definite location must be held to be a determination by the executive that the transactions with the Lake Su-

perior & Mississippi Company did not amount to a consolidation, for the conclusion that Ashland was the point of begining must negative the claim that Duluth was such point, and the secretary must have found that Duluth was *not* the point of beginning when he found Ashland was the point.

It appears that, as construction progressed between Thomson Junction and Ashland, this portion of the road was examined in three sections by commissioners appointed for that purpose by the president of the United Sates under Sec. 4 of the Northern Pacific granting act. This section provided that whenever twenty-five consecutive miles of road should be ready for the service contemplated, the president should appoint three commissioners to examine the same, and if it should appear "that twenty-five miles of said railroad and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States."

The commissioners appointed duly examined the road constructed from Thomson Junction to Ashland, and reported that the same had been constructed in all respects as required by the act, and, on the recommendation of the secretary of the interior, these reports were approved by President Arthur.

It is submitted that this examination and approval constitutes a finding by a special tribunal, which is conclusive on the question of proper location and construction, under the act. If the ques-

tion whether the road was located and constructed on the line contemplated was a question properly for the determination of the commissioners, there is no doubt but that their decision is final.

And the terms of the act providing that the commissioners shall report whether the railroad has been completed in a good, substantial and workmanlike manner, "as in all other respects required by this act," seem to include the requirements as to location as well as the requirement as to material.

The grant to the Southern Pacific Railroad Company contains a like provision for the examination by commissioners, and, in *United States v. Southern Pacific R. Co.*, 45 Fed. Rep. 596, where a question arose as to whether a certain company was the Southern Pacific Company referred to in the grant, the court held that the appointment of such commissioners and the acceptance of the road constructed upon their report were acts of the United States recognizing the company in question as the Southern Pacific Company, and were binding.

And every presumption which supports the title of the company to its right of way under the grant vested by the approval of its map of definite location supports its title to the adjacent land grant. The same consideration must control the judgment of the court in a suit to cancel a patent for a tract of land presumptively within the limits of the grant, as if the suit were one to vacate and annul the approval of the map of definite location, and thus divest the company of the title of the right of way which it has enjoyed for fifteen years.

The court said in *United States v. Iron Silver Mining Co.*, 128 U. S. 673, 676:

> "The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with, by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof."

The reason for this rule is that the patent is evidence of the judgment of the special tribunal to which the matter has been committed.

And the same rule must apply where the judgment of the special tribunal is evidenced by an approval of a map of definite location. But here the judgment of the department is shown by the approval of the map and by the patent itself.

It follows, therefore, that before it can be held that the patents here in question should be canceled, it must be held that the approval of the map of definite location was an act outside of the jurisdiction of the interior department, for if the department had jurisdiction to approve or reject the map, until the approval is set aside the limits of the land grant are defined as well as the grant of right of way.

VII.

The Contemporaneous Construction of the Department of the Interior is Controlling.

The courts have uniformly regarded with the greatest respect the contemporaneous construction placed upon acts of congress by the officers of the executive department to whom was committed the interpretation and execution of those acts. The decisions of the officers charged with the execution of such acts have been regarded as of the highest value as coming from men who are masters of the particular subject and familiar with the history of connected legislation. Where rights of private property have been involved, the courts have gone the full length in applying the reasons for the rule of *stare decisis*, if not the rule itself. The following authorities illustrate the respect paid by the courts to such contemperaneous construction:

> "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret." *U. S. v. McDaniels*, 7 Peters 1.

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overlooked without cogent reasons." *U. S. v. Moore*, 95 U. S. 763.

> "It is a familiar principle of interpretation that, in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into ef-

> fect is entitled to great respect." *U. S. v. Pugh*, 99 U. S. 269.

Justice Field, in *Robertson v. Downing*, 127 U. S. 607-13, said:

> "It is interesting to note the growth of this principle in our law. From the time it was first cautiously initiated in 1827, it has grown in strength every time it was again considered by the courts. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before."

In U. S. v. Burlington Ry. C., 98 U S. 334, the court said:

> "Such has been the uniform contsruction given to the acts by all the departments of the government. Patents have been given, bonds issued, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

The learned judge before whom the case of the United States was heard in the circuit court, after pointing out the long continued and contemporaneous construction by the department, holding the terminus to be at Ashland, recognizes the principle that such construction should be entitled to great weight, if the power of the company to build and operate its road to Ashland were doubtful, which he declares not to be the case. The opinion then continues:

> "The rule that grants by the sovereign, including, of course, all grants by the govern-

ment of franchises or of aid to a corporation, shall be strictly construed applies with full force to any case where the right to exercise the franchise to the extent attempted, or the right to aid, has not been conceded, but has been continually denied on the part of the government. But such rule of strict construction, is not fairly applicable to a case where the corporation has done acts and made large expenditures under the assumption that such acts necessitating such expenditures were within the scope of its franchises, being encouraged thereto by affirmative acts by the proper department of the government, confirmative of the same construction of the franchise. In such a case, in the absence of fraud, and after the lapse of years, the question of the correctness of such construction can scarcely be considered an open question." (Case No. 408, transcript p 167.)

And this statement of the law is fully supported by the language of this court in *United States v. Alabama R. R. Co.*, 142 U. S. 615, where it was said:

> "It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

In *Washington & Idaho R. R. v. Coeur d'Alene Ry Co.*, 160 U. S. 77-101, the court said:

> "When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are farly possible, to adopt that one which equity would favor."

And this contemporaneous construction of the department has been uniform and long continued, and supports the position of the appellees. The map of general route of 1870 was approved and the lands coterminous with the line were withdrawn; the alternate reserved even numbered sections were increased in price to $2.50 per acre, and the United States has reaped the benefit of this increase. The map of definite location was approved and three orders of withdrawal issued. The action of the directors of the company fixing the point of beginning at Ashland was ratified by the commissioner and the withdrawal adjusted accordingly. The construction adopted in 1870 was unquestioned until 1895, and even if the conclusion reached by the secretary in that year could be supported by a logical argument sufficient to render the true construction of the act a matter of doubt, yet the long continued construction, under which the road has been built and private interests have grown up, resting upon the security of the settled interpretation, should be held conclusive at this late day.

C. W. BUNN and
JAMES B. KERR,
Counsel for Defendant in Error and Appellees.

Statement of the Case.

In the Superior Court of Douglas County, Wisconsin, in November, 1896, Andrew Doherty filed a petition asking for the appointment of commissioners to appraise certain real estate taken by the Northern Pacific Railway Company for a portion of its line passing through property alleged to belong to the petitioner.

The petition alleged that Doherty was and had been since November 8, 1882, the owner in fee simple of the north one half of the southwest quarter of section 4, township 47, range 11 west, in Douglas County, Wisconsin; that the Northern Pacific Railroad Company was a corporation duly authorized by the laws of the United States to construct and maintain a line of railway from a point on Lake Superior, in the States of Wisconsin or Minnesota, to some point on Puget Sound, in the State of Washington; that some time during the year 1883 the said company had unlawfully laid its railroad track upon a portion of petitioner's land, and had unlawfully entered upon and appropriated the same, without the consent or authority of petitioner, and had been in possession thereof ever since until about August 31, 1896; that on or about the last mentioned date all the property, effects, rights and franchises of the Northern Pacific Railroad Company had been transferred and sold to and purchased by the Northern Pacific Railway Company, and said railroad has ever since been operated and owned by the said the Northern Pacific Railway Company, which the petition alleged to be a domestic corporation, duly authorized by its charter and the laws of the State of Wisconsin to maintain and operate the line of railway before mentioned; that neither the said Northern Pacific Railroad Company, nor its successor, the Northern Pacific Railway Company, has acquired title to said land, or made any attempt to acquire title thereto by purchase, eminent domain or otherwise. The petition further alleged that the value of the land so taken and the damages occasioned by the taking thereof were less than five million dollars and more than one hundred thousand dollars. Wherefore an order was prayed that commissioners be appointed to ascertain and appraise the compensation to be made, etc.

Statement of the Case.

To this petition the Northern Pacific Railway Company made answer asserting title by virtue of the grant of right of way by section 2 of the act of Congress of July 2, 1864, to the Northern Pacific Railroad Company, and of the purchase of the interest of the last named company, etc.

The essential facts in the case were settled by a stipulation in writing, substantially as follows:

"On July 2, 1864, the land in question was public land of the United States. On November 8, 1882, the petitioner Doherty made a homestead entry thereof, and thereafter complied with the homestead laws and received a patent from the United States purporting to convey the lands February 6, 1890. In December, 1885, the Northern Pacific Railroad Company took possession of the strip in controversy and constructed a railroad upon it, and remained in possession, operating the railroad, until August 31, 1896, when all the property, rights and franchises of said railroad company were sold to the appellant, the Northern Pacific Railway Company, a Wisconsin corporation, which is duly organized to operate said railroad, and has occupied said strip for railroad purposes. The Northern Pacific Railroad Company, of which the appellant is the successor in interest, was organized by and obtained its rights under an act of Congress approved July 2, 1864, 13 Stat. 365, c. 217, entitled An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route. By the first section of this act a corporation created thereby was authorized to lay out and construct a continuous railroad and telegraph line, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin; thence westerly upon the most eligible route as shall be determined by said company within the United States and north of the forty-fifth degree of latitude to some point on Puget's Sound. By the second and third sections of the same act the right of way through the public land of the United States was granted to said railroad company, its successors and assigns, for the construction of the line, and it was also provided that if its route should be found to be upon the same general line as the route of another railroad which

owned a previous land grant from the United States, the amount of said previous land grant should be deducted from the amount granted by this act, provided that the railroad owning the previous grant might assign its interest to the Northern Pacific Railroad Company, or might consolidate, confederate and associate with said company upon the terms named in the first section of the act. The lands granted to the Northern Pacific Railroad Company by the act amounted to ten alternate sections per mile on each side of the line within the States and twenty alternate sections in the Territories, with a ten-mile indemnity limit, and by resolution of Congress, May 31, 1870, an additional indemnity belt ten miles in width was created on each side of the line. This act was accepted by the company within the time required by law. The act also required the company to procure legislative consent of the States through which it was to run before its construction, and in the year 1865 the legislatures of Minnesota and Wisconsin gave such consent, the Minnesota act providing that if the eastern terminus of the road should be located east of the eastern boundary of Minnesota, then that the company should construct or cause to be constructed a railroad from its main line to the navigable waters of Lake Superior at some point within the State of Minnesota.

"In 1870 the company located its general route from the mouth of the Montreal River in Wisconsin, across Wisconsin and Minnesota to a point on the Red River of the North near Fargo, and transmitted a map showing this location August 13, 1870, to the Secretary of the Interior. This map showed the proposed general route to commence at the mouth of the Montreal River, thence a little south of west upon a direct line to a point directly south of and about six miles distant from the south end of Chequamegen Bay; thence a little north of west upon a direct line crossing the state boundary between Wisconsin and Minnesota, at or near the point where the St. Louis River becomes such boundary. Upon receipt of this map the Secretary of the Interior transmitted it to the Land Commissioner, with instructions to withdraw from sale, homestead and preëmption all odd-numbered sections of land within twenty

miles of the line within both States. This order was complied with by the Land Commissioner by directions given to the district land officers at Bayfield, Wisconsin. Such withdrawals were made and the price of the even-numbered sections was raised to $2.50 per acre, and thereafter large quantities of such land were sold by the Government at the rate of $2.50 per acre. In 1882 a map of definite location of said railroad from a point upon the St. Paul and Duluth Railroad, now called Thomson Junction, eastward to a point in section 15, township 47, north of range 2 west, in the State of Wisconsin, was prepared and approved by the directors and certified and forwarded to the Secretary of the Interior. The line of definite location laid down on this map followed substantially the line of general location upon the prior map, but it turned to the north and touched Superior, and also Ashland, and stopped some ten miles west of the mouth of the Montreal River. Upon receipt of this map of definite location the Land Commissioner, by direction of the Secretary of the Interior, adjusted the land grant in accordance with it, and prepared diagrams showing the limits of the grant and indemnity belts, and transmitted such diagrams to the district land officers with the proper directions as to the withdrawal of lands, which were complied with.

"August 2, 1884, the directors of the Northern Pacific Railroad Company adopted a resolution fixing the eastern terminus of the railroad at the city of Ashland, which resolution was duly certified and transmitted to the Commissioner of the General Land Office, December 3, 1884. Thereafter the Commissioner prepared a diagram showing the final eastern terminus of the line at Ashland, and sent the same to the district officers at Bayfield, with instructions to adjust the grant on this basis. The point so fixed is on the line of definite location of July 6, 1882, but about twelve miles west of the east end of that line. The Northern Pacific Railroad Company constructed a continuous line of railroad from the city of Ashland to Puget's Sound, in all respects in accordance with its act of incorporation, and the whole line has been duly accepted by the President of the United States, as provided in that act. That portion of the road extending east from Thomson Junction was

constructed upon the line of definite location shown in the map of 1882, and was so constructed during the years 1881, 1882, 1883 and 1884.

"The first section extended from Thomson Junction to Superior, and was examined and reported favorably upon by commissioners in 1882, and the recommendations were approved by the President, September 16, 1882; the second section, extending from Superior to the Brule River, was constructed in the latter part of 1883, and crossed the land in question here, and was approved in like manner January 31, 1884; the third section extended from the Brule River to Ashland, and was approved in like manner February 18, 1885. It appears further that, March 6, 1865, one Josiah Perham, then the president of the Northern Pacific Railroad Company, transmitted to the office of the Land Commissioner a map purporting to show the proposed general route of the Northern Pacific Railroad. Upon this map there appeared two lines from a point in the present State of North Dakota eastward, one terminating upon Lake Superior at or near Duluth, and the other extending into Wisconsin some distance south of Lake Superior, and terminating at the mouth of the Montreal River, this last named line being apparently partially obliterated by a wavy red line. This map was accompanied by a letter from Perham, stating that it shows the general line of the Northern Pacific Railroad from a point on Lake Superior in Wisconsin to a point on Puget's Sound. The Secretary of the Interior transmitted this map to the Land Commissioner, suggesting the withdrawal of the lands along the line, but the Land Commissioner soon afterward transmitted a letter to the Secretary of the Interior recommending that the map be rejected, for the reason that the same did not comply with the rules of the land department, which recommendation was approved by the Secretary. There is nothing to explain the apparent alteration of this map nor to show when it was made, and it is not shown that the directors of the company ever authorized the making or filing of the map, but it appears that the president of the company had no power to make or file it.

"By act approved May 5, 1864, c. 79, 13 Stat. 64, Congress granted ten sections of land per mile to the State of Minnesota

to aid in the construction of a railroad from St. Paul to Lake Superior. In the same year the legislature of Minnesota conferred this grant upon the Lake Superior and Mississippi Railroad Company, a Minnesota corporation, and afterwards known as the St. Paul and Duluth Railroad Company. On January 1, 1872, this company had constructed and was operating a railroad from St. Paul to Duluth, by way of Thomson Junction, which is upon the St. Louis River, and is the point from which the Northern Pacific Railroad Company started to build its line westward. On the last-named date the Northern Pacific Railroad Company purchased a one half interest in that part of this road, extending from Thomson Junction to Duluth, for the sum of $500,000, and received a deed therefor. On the same day the two companies made a written agreement providing for the operation of trains and the maintaining of the road. On May 1, 1872, the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company made a further agreement, by which the lines of the Lake Superior and Mississippi Railroad were leased to the Northern Pacific Railroad for an annual rental, the land grant of the Lake Superior and Mississippi Railroad being expressly excepted from the operation of the lease. Pursuant to this lease the Northern Pacific Railroad Company operated the entire railroad thus leased, from May 1, 1872, until February 1, 1874, when it surrendered the lines leased and relinquished all its interest under the lease, but surrendered no rights under the deed. On the 12th of May, 1874, the Northern Pacific Railroad Company and the Lake Superior and Mississippi Company made an agreement for the operation of the line from Thomson Junction to Duluth.

"It further appears that, by act approved May 5, 1864, c. 80, 13 Stat. 66, the United States granted lands to the State of Wisconsin to aid in the construction of a railroad from Bayfield to Superior, but no road was constructed under this grant."

The Superior Court of Douglas County sustained the petition and appointed commissioners as prayed for. An appeal was taken to the Supreme Court of Wisconsin, which court, on June 23, 1898, reversed the order of the Superior Court, and remanded the cause to that court with directions to dismiss the

DOHERTY *v.* NORTHERN PACIFIC RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 121. Argued January 26, 29, 1900. — Decided April 16, 1900.

The eastern terminus of the Northern Pacific Railroad, which was constructed under the powers conferred upon that Railroad Company by the act of July 2, 1864, c. 217, 13 Stat. 365, was at Ashland in Wisconsin, and that company acquired a right of way over public lands in Wisconsin, including the land in question in this case.

petition. *Northern Pacific Railway* v. *Doherty*, 100 Wisconsin, 39.

Thereupon the cause was brought here by a writ of error allowed by the Chief Justice of the Supreme Court of Wisconsin.

Mr. C. W. Russell, for the United States.

Mr. M. S. Bright for Doherty submitted on his brief.

Mr. James B. Kerr and *Mr. C. W. Bunn* for the Northern Pacific Railway Company.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

It is conceded that Doherty, the plaintiff in error, owns the southwest quarter of section 4, township 47 north, of range 11 west, in Douglas County, Wisconsin, having made a homestead entry thereof November 8, 1882, and obtained a patent therefor February 6, 1890.

The Northern Pacific Railway Company, the defendant in error, claims a right of way four hundred feet in width over and across this quarter section, and has constructed and is operating its railroad thereon. It is not claimed that this right of way was acquired by purchase or condemnation, but it is claimed by virtue of the terms of the act of Congress, approved July 2, 1864, c. 217, 13 Stat. 365, incorporating the Northern Pacific Railroad Company, and granting to it, among other rights and privileges, a right of way through the public lands of the United States. This act authorized the corporation, thereby created, to construct a railroad "beginning at a point on Lake Superior in the State of Minnesota or Wisconsin" westward to "some point on Puget's Sound," and the controlling question in this case is whether the eastern terminus of the railroad constructed under the act is at Duluth, Minnesota, or at Ashland, Wisconsin. If at Duluth, then the company acquired no right of way over any public land in Wisconsin; but if at Ashland, then it did acquire a right of way over public lands in Wisconsin, including the land in question.

It is conceded that on August 2, 1884, the directors of the Northern Pacific Railroad Company adopted a resolution fixing the eastern terminus of the railroad at Ashland; that this resolution was transmitted to the Commissioner of the General Land Office; that thereafter the Commissioner prepared a diagram showing the final eastern terminus of the line at Ashland, and sent the same to the district officers at Bayfield, Wisconsin, with instructions to adjust the grant on this basis; that a continuous line of railroad from Ashland to Puget's Sound in all respects in accordance with the act of incorporation, and as depicted upon its map of definite location has been constructed, and has been accepted as such by the President of the United States. Such concessions would seem to warrant a conclusion that the defendant in error is entitled, as matter of right, to maintain and operate its road upon a right of way over the land in dispute, and we are led to inquire why it is that such a conclusion is disputed.

And, first, it is claimed by the plaintiff in error that the Northern Pacific Railroad Company definitely located its eastern terminus at Duluth, January 1, 1872, when it purchased one half of the track and right of way of the Lake Superior and Mississippi Railroad Company from Thomson Junction to Duluth, and made a contract for operation of the line in common.

In reply to this claim the company denies that, by purchasing an interest in the line from Thomson Junction to Duluth, it was ever intended by the company to make Duluth the eastern terminus, or that the arrangement with the Lake Superior and Mississippi Railroad operated, as a matter of law, to fix and determine Duluth as the eastern terminus; and attention is called to the fact that it is provided in the act of July 2, 1864, that before the Northern Pacific Railroad Company could commence the construction of its road it should obtain the consent of the legislature of any State through which any portion of its line might pass. Such consent was obtained from the States of Wisconsin and Minnesota; and in the act of the latter State, granting consent, it was in terms provided "that should the company elect to make the eastern terminus of said line east of the eastern boundary of the State of Minnesota, then, and in

that case, they shall construct, or cause to be constructed, a line of railroad from the said main line to the navigable waters of Lake Superior, within the State of Minnesota, of the same gauge as said main line, for which purpose, the same powers, rights and privileges are hereby granted to said company as they have or may have to construct said main line in the State of Minnesota."

Evidently it was not intended by the legislature of Minnesota by this enactment to compel the railroad company to make its eastern terminus within the limits of that State. Indeed, the act recognizes the right of the company to elect to make its eastern terminus east of the limits of Minnesota.

It was, then, in compliance with the condition imposed by Minnesota, namely, that in case the railroad company elected to make its eastern terminus in Wisconsin, that the arrangement was made whereby the line from Thomson Junction on the main line to Duluth became, as to one half thereof, the property of the Northern Pacific Railroad Company.

We agree with the Supreme Court of Wisconsin in so regarding this transaction, and also in its holding that the arrangement between the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company did not constitute a consolidation of the companies in any legal sense, so as to make the short line between Thomson Junction and Duluth a part of the trunk line contemplated by Congress.

When, in August, 1870, the company located its proposed general route, and when its map of such location was approved by the Secretary of the Interior, showing its eastern terminus to be in Wisconsin, it became obligatory on the company to comply with the condition imposed, in that event, to construct a branch line to Lake Superior within the limits of Minnesota, and hence the agreement with the Lake Superior and Mississippi Railroad Company.

It is next contended by the plaintiff in error that, even if Duluth is not to be regarded as the eastern terminus of the company's road, yet that when afterwards, in constructing its road eastward from Thomson Junction, the company's road reached the city of Superior, the latter thereby became the

point on Lake Superior which was to be regarded as the eastern terminus; that the city of Superior was the first point at which the Northern Pacific Railroad Company connected with Lake Superior by its own road, and it thereby became the initial point contemplated by the granting act.

In connection with this proposition it is necessary to take notice of certain legislation of the State of Wisconsin.

By an act approved April 10, 1865, the legislature of that State gave its consent, unconditionally, to the Northern Pacific Railroad Company to build and maintain its road within the state limits. Stats. 1865, c. 465.

On March 25, 1872, the legislature passed an amending act, whereby the consent previously given to the Northern Pacific Railroad Company to construct and operate its road in the State of Wisconsin was made subject to certain conditions, among which were that the company should build and operate a line of railroad running from the junction of the said main line of the Northern Pacific Railroad Company with the Lake Superior and Minnesota Railroad to the bay of Superior, and should build and maintain at the latter point docks and piers suitable for the transfer of passengers and freight between the railroad and lake-going craft; and that until such connecting road and docks were constructed, it should not be lawful for the company to construct or maintain any other railroad in Wisconsin. Stat. 1872, c. 139.

To comply with this legislation it was necessary for the company to alter the line of its road as defined by its map of general route, so that the same might touch the lake at the bay of Superior. But it does not follow that thereby the company abandoned its right to itself select the point of its eastern terminus. This and the similar legislation of Minnesota were not intended or regarded as taking away from the company its rights and powers under the act of Congress. They only imposed, whether lawfully or otherwise, certain conditions respecting branch line connections which the legislatures deemed desirable for local advantage.

Some reliance is placed upon two decisions of the Secretary of the Interior — the first rendered November 13, 1895, and

reported in volume 21, Land Decisions, 412; the second, rendered August 27, 1896, and reported in volume 23, Land Decisions, 204.

Those decisions were made by the Secretary in disposing of a list of indemnity selections filed by the Northern Pacific Railway Company, based on losses of lands within the place limits lying east of the city of Superior. The opinion of the Secretary was that because the company was empowered to locate and construct a line of railroad from a point on Lake Superior to some point on Puget's Sound, it had authority to touch the lake at only one point, and that notwithstanding it filed a map of definite location from Thomson Junction to Ashland, the fact that the line so located and constructed touched the lake at the city of Superior precluded the company from extending its line eastward from that point. In his later decision the Secretary concluded that the transaction between the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company was, in legal effect, a consolidation of the two corporations, and that, therefore, the eastern terminus of the Northern Pacific Railroad was definitely fixed at Duluth.

We do not care to repeat the considerations already advanced going to show that, in our opinion, the right of the railroad company, under the act of July 2, 1864, to select its eastern terminus at a point on Lake Superior in the State of Minnesota or Wisconsin, was not intentionally, or by operation of law, ended or determined by the company's compliance with the conditions sought to be imposed by the legislation of Minnesota and Wisconsin. The views of the Supreme Court of Wisconsin on this subject may be properly quoted: "On March 6, 1865, one Josiah Perham, then president of the Northern Pacific Railroad Company, filed with the Secretary of the Interior a map showing a proposed route of the proposed railroad. On this map appear two lines from a point in North Dakota to Lake Superior, one ending at Duluth and one at the mouth of the Montreal River. The latter line is partially obliterated by a wavy red line through its whole length. It appears affirmatively that the president had no authority to make or file this

map, and that the directors never authorized it; and further, that on June 22, 1865, the map was rejected by the Land Commissioner and by the Secretary of the Interior because it did not comply with the rules and regulations of the land department. No further action was ever taken upon it, and it seems too plain to require argument that it can cut no figure in the case. All the subsequent maps made and filed by the corporation, as well as its recorded acts, show the clear intention to make the eastern terminus of the road in Wisconsin. In 1870 a map of general route was filed, showing the eastern terminus to be at the mouth of the Montreal River; upon receipt of which the odd-numbered sections of land within twenty miles of the line were withdrawn from sale, homestead and preemption entry in the States of Minnesota and Wisconsin, and the price of land in the even-numbered sections was raised to $2.50 per acre, and large quantities sold by the United States at that price. In 1882 a map of definite location of the line from Thomson Junction eastward to a point in section 15, township 47, range 2 west of the fourth P. M., was filed in the land office at Washington. This line passed through Ashland and terminated a few miles east of that city. This map was approved, and the land grant adjusted in accordance therewith by the department. In August, 1884, the board of directors of the company, by formal resolution, fixed the eastern terminus of the road at Ashland, and a certified copy of the resolution was filed in the General Land Office in December, 1884, whereupon the Land Commissioner made a diagram showing the eastern terminus so fixed, and adjusted the grant in accordance therewith.

"The portion of the road extending eastward from Thomson Junction to Ashland was constructed in the years 1881, 1882, 1883 and 1884, and was examined in three sections by commissioners appointed by the President of the United States, as provided by the act of incorporation. The commissioners reported favorably upon all of these sections, and their recommendations were approved by the President, the last approval being dated February 6, 1885.

"All of these deliberate acts of the department and executive

officers are brushed aside by Commissioner Smith on the ground that the terminus of the road had been unalterably fixed at Duluth by the action of the Northern Pacific Railroad Company in 1872. As we do not agree with the Commissioner's premise we cannot agree with his conclusion, and therefore hold that the terminus of the road is at Ashland, and hence that the railroad company had a right of way across the petitioner's land by virtue of the provisions of the act of incorporation." *Northern Pacific Railway Company* v. *Doherty*, 100 Wisconsin, 39.

In a bill filed in the Circuit Court of the United States for the District of Minnesota by the United States against the Northern Pacific Railroad Company, the Northern Pacific Railway Company and others, it was sought to have cancelled and annulled a patent granted by the United States, on April 22, 1895, to the Northern Pacific Railroad Company, for lot 5 of section 29, township 54 north, of range 13 west, in the county of St. Louis and State of Minnesota, a tract of land situated more than ten miles east of Duluth, which the bill averred to be the eastern terminus or eastern initial point of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864. The bill alleged that the patent had been granted through inadvertence and mistake, and under an "erroneous impression and mistaken belief that said tract of land was lying and being within the limits of the aforesaid grant to the Northern Pacific Railroad Company."

The case was so proceeded in, on bill, answer and an agreed statement of facts, that on February 20, 1899, the bill of complainant was dismissed for want of equity; and this decree was, on appeal to the Circuit Court of Appeals for the Eighth Circuit, on July 10, 1899, by that court affirmed. *United States* v. *Northern Pac. R. Co.*, 95 Fed. Rep. 864.

The controversy in that case involved the same questions as those we have been considering in the present case of Doherty, and the conclusions reached were that the land department committed no error of law when it held that the Northern Pacific Railroad Company had authority under its charter to locate its eastern terminus at Ashland, and made no mistake of fact when it found that the Northern Pacific Railroad Company

had actually selected Ashland as its eastern terminus. The facts and reasoning relied on by the respective parties were, in the main, the same with those that were relied on in the case in the Supreme Court of Wisconsin, now under review in this court.

The judgment of the Supreme Court of Wisconsin is

Affirmed.

MR. JUSTICE MCKENNA did not take part in the decision of the case.